91-1280

(1)

Supreme Court, U.S.
FILED
FEB 5 1992
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1991

WALTER ZANT, WARDEN,

Petitioner,

v.

JIMMY LEE HORTON,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Is the clearly erroneous standard of review to be applied to a claim arising under *Swain v. Alabama*, 380 U.S. 202 (1965), when the issue of intentional discrimination has been traditionally held to be a question of fact?

II.

Did the Eleventh Circuit impermissibly engage in fact finding and disregard the facts found by the District court without setting them aside as "clearly erroneous" in contravention of Rule 52(a) of the Federal Rules of Civil Procedure and *Amadeo v. Zant*, 486 U.S. 214 (1988)?

III.

Should the Court grant certiorari to clarify what is a prima facie case for establishing an equal protection violation under *Swain v. Alabama?*

IV.

Does the equal protection analysis for a claim arising under *Swain v. Alabama* require consideration of both the number of prospective black jurors struck as well as the number of black jurors actually seated in order to determine if there has been historic disenfranchisement of blacks?

QUESTIONS PRESENTED – Continued

V.

In considering whether the out-of-court declaration of a co-conspirator has been shown to be sufficiently reliable to allow its admission, should a court consider other facts in evidence?

VI.

Does an attorney have a per se duty to present mitigating evidence at the sentencing phase of a death penalty trial?

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Warden Walter Zant, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on September 3, 1991, and the subsequent denial of the suggestion of rehearing en banc on October 31, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 941 F.2d 1449, and is reprinted in the Appendix hereto, App. 56, *infra*.

The decision of the United States District Court for the Middle District of Georgia, Macon Division (Owens, C. J.) has not been reported. It is reprinted in the Appendix hereto, App. 2, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on September 3, 1991, and the suggestion of rehearing en banc was denied on October 31, 1991. On January 24, 1992, Justice Kennedy ordered that the time for filing this petition for writ of certiorari be extended to and including February 5, 1992.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence."

Fourteenth Amendment, United States Constitution:

> "No State shall . . . deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

Respondent, Jimmy Lee Horton, was indicted by the Bibb County, Georgia, grand jury on January 8, 1981, for the November 28, 1980, malice murder of Willard Don Thompson, the burglary of the residence of Sherrell Grant and the burglary of the residence of Willie James Griffin. Since victim Thompson was then district attorney for Bibb County, Joseph H. Briley was appointed to act as district attorney pro tempore. Since the state sought the death penalty, the case proceeded under Georgia's Unified Appeal Procedure. Upon a jury trial on February 23-27, 1981, Respondent was convicted on all counts. At the sentencing phase, the jury found the existence of one statutory aggravating circumstance, "the offense of murder was committed while the offender was engaged in the commission of burglary," and sentenced Respondent to death for murder. O.C.G.A. § 17-10-30(b)(2). The trial court sentenced Respondent to terms of twenty years on each of the two burglaries, to run concurrently with each other but consecutively to the death sentence. On October 2, 1981, Respondent filed an "unusual and extraordinary motion for new trial as to sentencing on the basis of newly discovered evidence," which was denied after hearing on March 8, 1982. The convictions and sentences, as well as the denial of the extraordinary motion for new trial, were affirmed on direct appeal. *Horton v. State*, 249 Ga. 871, 295 S.E.2d 281 (1982), *cert. den.*, 459 U.S. 1188, *rehg. den.*, 460 U.S. 1048 (1983).

While the petition for writ of certiorari was pending in this Court, Respondent filed a petition for a writ of habeas corpus in the trial court, the Superior Court of Bibb County. The Supreme Court of Georgia affirmed the

dismissal of this petition by the trial court as "prematurely filed," finding that Respondent's convictions were not yet final due to the pendancy of the certiorari petition. *Horton v. Wilkes*, 250 Ga. 902, 302 S.E.2d 94 (1983).

After the denial of certiorari, Respondent then filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. Following an evidentiary hearing on April 3, 1984, the state habeas corpus court denied relief on November 7, 1986. The Supreme Court of Georgia denied the application for a certificate of probable cause of appeal on April 15, 1987. This Court denied certiorari. *Horton v. Georgia*, ___ U.S. ___, 108 S.Ct. 248, *rehg. den.*, ___ U.S. ___, 108 S.Ct. 475 (1987).

On February 24, 1988, Respondent's application for federal habeas corpus relief was sanctioned by the United States District Court, Middle District of Georgia, Macon Division. (R1-1, 4). Respondent subsequently filed a brief in support of this petition. (R1-6). Petitioner Zant (hereinafter the Warden) subsequently filed an answer, a supporting brief, the record, a supplemental answer and supplemental brief. (R1-9, 10, 11, 12, 13).

On June 14, 1988, the district court granted discovery to Respondent on the claim raised under *Swain v. Alabama*, 380 U.S. 202 (1965). (R1-15). The Warden subsequently also sought leave to conduct discovery. (R2-20).

An evidentiary hearing was held before the district court on October 18, 1989, on the *Swain* issue. (R3-48). The parties subsequently submitted post-hearing briefs. (R2-46, 49).

On April 12, 1990, the district court denied habeas corpus relief as to all issues raised. (R2-50). Judgment was entered in favor of the Warden and against Respondent on that same date. (R2-51).

On April 23, 1990, Respondent filed a motion for a new trial. (R2-52). The district court denied the motion for new trial on April 24, 1990. (R2-53).

Respondent subsequently filed a notice of appeal and an application for certificate of probable cause to appeal and an application for certificate of probable cause to appeal and for leave to appeal in forma pauperis. (R2-54, 55). On August 24, 1990, the district court granted Respondent a certificate of probable cause. (R2-57).

On September 3, 1991, a panel of the United States Court of Appeals for the Eleventh Circuit found that Respondent had established a prima facie case of historic discrimination by the prosecutor in his use of strikes under *Swain v. Alabama*, 380 U.S. 202 (1965), and reversed Respondent's convictions, found that trial counsel rendered ineffective assistance of counsel at the sentencing phase of the trial and found that the admission of the declaration of a co-conspirator under Georgia's co-conspirator exception to the hearsay rule violated the confrontation clause. *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991) (App. 56). The panel addressed two other claims raised by Respondent Horton and found that they lacked merit, these being a claim that the prosecutor's reference to the victim in his closing argument was the equivalent of a "victim impact statement" and that the trial court's denial of the extraordinary motion for new trial allegedly

violated the due process clause. The Warden's suggestion of rehearing en banc was denied on October 31, 1991.

The Warden's motion to stay the issuance of the mandate was granted by a single judge of the Eleventh Circuit on November 13, 1991, and the issuance of the mandate was stayed up to and including January 29, 1992. On January 24, 1992, Justice Kennedy ordered that the time for filing this petition for writ of certiorari be extended to and including February 5, 1992.

STATEMENT OF FACTS

On the evening of November 28, 1980, Respondent Horton borrowed a truck from Hamp Davis, a 1976 Ford pick-up, between 6:00 and 7:00 p.m. (Trial Transcript 565, 644, 740-41) (hereinafter designated T.). Respondent told Davis that he allegedly needed the truck to move furniture. (T. 740-41).

Later that same evening, specifically between 6:30 and 8:00 p.m., Respondent and Pless "Chug" Brown broke into the home of Willie James Griffin. (T. 522-55, 646, 851, 887, 890). They took a black H&R .22 caliber pistol, serial number AF78685, along with the bullets for the gun, a television and a wedding band. (T. 553-56). Griffin identified state's exhibit number 3 as the gun stolen from his home. (T. 556).

Several hours later, Respondent Horton and Brown burglarized the apartment of Sherrell Grant who resided at the Raintree Apartment Complex. (T. 646; 675; 678). Ms. Grant had been out with Willard Don Thompson,

District Attorney of the Macon Judicial Circuit, at a friend's home having dinner. (T. 675-77). Around 11:00 p.m., Respondent and Brown, using a screwdriver later found in Respondent's car, forced their way into her apartment, number A6, through a sliding glass door. *Id.* Respondent and Brown took Ms. Grant's silver-barreled pistol and collected some furniture. (T. 650, 652-53, 892, 901). The burglars had managed to transport some of the furniture outside before they were interrupted. (T. 691, 805-806, 892).

Shortly after 11:00 p.m., Ms. Grant and Thompson returned to her apartment. (T. 77). They found that the front door was not completely closed and saw that the apartment had been ransacked and items of furniture, such as a coffee table, a rocking chair, and a wicker elephant, were missing. (T. 678). They went next door to the apartment of Benji Davis, and Davis confirmed he had heard footsteps and noise from her apartment. (T. 679). Ms. Grant borrowed the neighbor's gun, and Thompson loaded the gun, which was subsequently identified as State's Exhibit No. 6 (T. 680). Thompson entered the apartment while Ms. Grant stood outside the neighbor's apartment and then moved to the walkway. (T. 681).

Ms. Grant saw a truck backed up to the end of the apartment building. (T. 682). She then saw a black male come around to the end of the apartment building, see her, and then go back. *Id.* She described this man as short, with an afro haircut, and wearing dark clothing. *Id.* As she began looking at the items on the truck to see if any were hers, the man came back to the passenger's side of the truck. (T. 683). A "much, much taller" black male, with parted hair and a light complexion, came to the

same end of the apartment building and headed toward the truck. (T. 684, 687). Ms. Grant asked the man to stop and not go anywhere, and he started shooting at her with a gun that had a black barrel. (T. 687). She was positive that the weapon pointed directly at her and which fired three shots at her was not silver-barreled. (T. 687-89). The neighbor pulled Ms. Grant into the apartment, and she then heard more shots. (T. 690). While the neighbor called police, Ms. Grant went outside and saw the truck was gone. (T. 691). During the search for Thompson, Ms. Grant saw a wicker bar stool and her rocking chair at the end of the apartment building. (T. 691-92).

In a custodial statement to police, Respondent Horton admitted breaking into the apartment and stated he and his companion had piled up furniture and were to carry it to the truck but they then saw the girl standing in front. (T. 646-47). In this statement Respondent also said he saw a man who was peeping around the corner. *Id.* Respondent claimed that when he heard four to five shots, he and his companion ran to the truck and afterwards Respondent fired twice in the air after the girl told him to stop. *Id.* In his testimony at trial, however, Respondent reversed the order of the shots and testified that he fired at Ms. Grant and that he subsequently heard two more volleys thereafter. (T. 893, 895, 896-97). Although Respondent contended he heard three series of shots (T. 897), Ms. Grant, Mr. Thiel, and resident manager Carol Baker only heard two series of shots. (T. 609-10; 689-90, 710; 716, 718, 720).

Resident manager Carol Baker could see the flash from the guns when the second round of shots was being fired. (T. 716). Ms. Baker could tell that the shots were

coming from the truck and that the passenger's door was slightly open. (T. 716-17). Four shots were fired and then the truck left immediately. (T. 718). No one got in the truck before it left (T. 719). Ms. Baker estimated that five seconds elapsed between the first and second series of shots. (T. 720). Ms. Baker identified the bullet holes, which were the height of Ms. Grant's head, in the office manager's door. (T. 727).

Thompson was found slumped over behind the apartment building, with a gun in his hand. (T. 693; 775). This gun had not been fired. (T. 801-802). The autopsy revealed three observable injuries: a gunshot entry wound to the left upper arm, an exit wound on the inside of the arm, and a third wound in the upper left chest, approximately 7 inches below the top of the head and $5^{3}/_{4}$ inches to the left of the front midline of the chest. (T. 827-28). The bullet had traveled through the arm, across the rear of the lung and the heart, ruptured one of the pulmonary arteries and the aorta. (T. 829, 831). The cause of death was a loss of blood internally. (T. 831). A .22 caliber bullet was removed from the victim's lung, (T. 832), which was compared to bullets test fired from State's Exhibit No. 3, the .22 caliber weapon serial number AF78685; the fatal bullet had been fired from this weapon, which had been stolen earlier that night during the burglary of the Griffin residence. (T. 669, 687, 707, 787-88, 792-93, 832, 851-55). Although Respondent claimed that Pless Brown had the murder weapon, which was a black-barreled revolver, at the time of the shooting, Sherrell Grant was positive that the weapon fired at her

by Respondent, the taller of the two men, was black-barreled.[1] (T. 687-89, 710; 897).

The pistol which was the murder weapon was subsequently located in the apartment at which Respondent resided. (T. 788, 793, 856-57). At trial Respondent attempted to explain his possession of the murder weapon by claiming that he and Brown switched guns afterwards at Respondent's apartment as Brown allegedly wanted the silver-plated gun. (T. 900, 937). Respondent also contradicted his pretrial statement in his trial testimony by testifying he never saw the victim, although Respondent had said in the statement he saw a man. (T. 646-47; 934).

Although Respondent claimed at trial that Pless Brown must have shot the victim, Respondent admitted to Hamp Davis the day after the murder that Respondent was the triggerman. (T. 892-94, 900-901). Specifically, Davis testified that on the day after the shooting, Respondent came by and told Davis of the events of the night before, that it was "either me or him" and that Respondent shot the victim from a crouching position. (T. 742). Approximately one week later, Davis ran into Pless Brown who asked Davis if "you heard what your boy has did?" (T. 743). Brown admitted to Davis participating in the burglary and told Davis that Respondent shot the victim. *Id.*

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[1] Respondent at the time of trial was approximately 6' 3" tall, 200 pounds, medium complexion while Pless Brown was 5' 9" tall, 150 pounds, and dark complexion. (T. 874, 876).

The jury found Respondent guilty of murder and two counts of burglary. (T. 1026). At the sentencing hearing, the prosecutor introduced Respondent's 9 prior convictions. (T. 1064-66, 1191-1224). The jury found the existence of one statutory aggravating circumstance, namely that "the offense of murder was committed while the defendant was engaged in the commission of a burglary," and sentenced Respondent to death. (T. 1125). The trial court subsequently sentenced respondent to two 20 year sentences for the 2 burglaries, without parole, to run consecutively to the death sentence but concurrently with each other. (Trial Record 157-58).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE STANDARD OF REVIEW FOR AND THE ELEMENTS OF A PRIMA FACIE CASE UNDER *SWAIN V. ALABAMA*.

At the outset, the Warden acknowledges it seems an anomaly to be petitioning this Court on a *Swain* issue in light of the change in the burden of proof to establish intentional discrimination by a prosecutor in his use of peremptory strikes in *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Batson*'s progeny. This Court has lessened *Swain*'s "crippling burden of proof" by allowing a defendant to attempt to show "a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." *Batson*, 476 U.S. at 92, 98. Particularly in light of *Batson*'s subsequent

application to white defendant cases, *Powers v. Ohio*, ___ U.S. ___, 111 S.Ct. 1364 (1991), to civil cases, *Edmonson v. Leesville Concrete Co., Inc.*, ___ U.S. ___, 111 S.Ct. 2077 (1991), and even potentially to the defendant's own use of strikes, *Georgia v. McCollum* ___ U.S. ___, 112 S.Ct. 370 (cert. granted Nov. 4, 1991), it would seem that *Swain* at this juncture would be a relic of the past.

Perhaps *Swain* claims were resurrected in anticipation of a change in the burden of proof, as occurred in *Batson*, and also in hopes of its being given fully retroactive application, which did not occur. Whatever the reason, *Swain* claims are being actively litigated in state and federal courts in other cases as evidenced by the fact that this is the third *Swain* violation found by the Eleventh Circuit since *Batson*. Far from fading in importance, the issue of what a *Swain* violation is, and what standard of review should be applied, is an issue ripe for decision.

A. THE QUESTION OF INTENTIONAL DISCRIMINATION HAS HISTORICALLY BEEN A QUESTION OF FACT.

The Warden asserted below that the claim that the prosecutor had allegedly historically used his peremptory strikes to systematically and intentionally exclude blacks, was a question of fact to be governed by the clearly erroneous standard. Not only did the Eleventh Circuit fail to apply a question of fact standard, the court never even stated it was applying any standard of review. More telling is the court's discussion of the *Swain* claim showing that the court failed to acknowledge a single fact

found by the district court pursuant to the federal evidentiary hearing on the *Swain* issue. As this Court has held that the question of intentional discrimination in the *Batson* context is a question of fact to which a reviewing court should afford great deference, this Court should grant certiorari to clarify whether a *Swain* claim also involves a question of fact.

In *Batson*, this Court noted that the trial court would have the duty to determine intentional discrimination and in a footnote noted this had traditionally been a question of fact. *Batson*, 476 U.S. at 98, n. 21, citing *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). In *Hernandez v. New York*, ___ U.S. ___, 111 S.Ct. 1859, 1869 (1991), a plurality of this Court held, "*Batson*'s treatment of intent to discriminate as a pure question of fact, subject to review under a deferential standard, accords with our treatment of that issue in other equal protection cases." Finally, in *Ford v. Georgia*, ___ U.S. ___, 111 S.Ct. 850, 855-56 (1991), this Court noted that *Batson* had "dropped the *Swain* requirement of proof of prior discrimination . . . " so that a prima facie violation could be established within the context of a single case and that *Batson* "did not change the nature of the violation recognized in *Swain*, but merely the quantum of proof necessary to substantiate a particular claim" so that "a defendant alleging a violation of equal protection of the law under *Swain* necessarily states an equal protection violation subject to proof under the *Batson* standard of circumstantial evidence as well." Thus, it necessarily follows that any inference of discrimination under *Swain* would be a question of fact for the trial court, in this case the federal district court, to which a reviewing court

should accord great deference, and this Court should so hold.

B. THE ELEVENTH CIRCUIT IGNORED THE "CLEARLY ERRONEOUS" RULE.

Here, in clear disregard of Rule 52(a) of the Federal Rules of Civil Procedure, the Eleventh Circuit accorded no deference to any of the facts found by the district court on the *Swain* issue and never delineated any facts it was setting aside as "clearly erroneous." The appellate court engaged in its own fact-finding and credibility determinations, as if the hearing had been conducted by the appellate court.

The district court had before it two tables of available statistics on the prosecutor's historic use of strikes, entered pursuant to a stipulation only as to the accuracy of the numbers themselves. (App. 42-43). The district court reviewed the two tables of strikes utilized by the prosecutor in this case, with Attachment A to the district court opinion being the prosecutor's use of strikes in noncapital cases and Attachment B being the use of strikes in capital cases. (App. 34, 42-55). With regard to the 126 noncapital cases, the district court found the prosecutor had struck 790 blacks and 390 whites with 6 veniremen not identified by race, while defense attorneys had struck 495 blacks and 1,630 white potential jurors, with 15 not identified by race. (App. 35). The district court noted that of the 126 noncapital cases, only 4 cases had been decided by all white juries and that in 3 of these 4 cases, the defense attorneys had struck more blacks than had the prosecutor. *Id.* Most significantly, the district

court found that the prosecutor's use of strikes resulted in only 1 all white jury out of 126 noncapital trials. The court also found facts as to the number of black jurors actually serving, with 105 of the 126 trials having more than 1 black juror. *Id.*

With regard to the 27 capital cases, the district court found that only 2 of those 27 cases had involved all white juries, with these 2 being Respondent Horton's case and that of a female which had been selected from an all white venire. *Id.* The district court further found that of the 27 capital trials, only 4 trials had 1 black juror while the remaining 23 trials had between 2 and 8 black jurors who actually served. *Id.*

Based on these numbers, the district court found as fact that Respondent had not shown that the prosecutor "has historically and systematically excluded blacks from serving on trial juries. The facts show only that the prosecutor struck black jurors more often than white jurors – 67 per cent of his strikes – leaving black jurors on the jury in virtually all but petitioner's case." (App. 36).

The district judge who conducted the evidentiary hearing in this case and the prosecutor whose motives are in question are the same district judge and prosecutor in *Amadeo v. Zant*, 486 U.S. 214 (1988). The district judge in this case, as noted in *Amadeo*, had presided over the unrelated civil law suit where the so called "smoking gun" memorandum authored by prosecutor Briley was discovered and which served as the basis for the district judge's grant of relief in *Amadeo*. Based upon the percentage of strikes and the prosecutor's conduct identified in *Amadeo*, Respondent Horton urged the district court to

find a pattern and practice of discrimination and systematic exclusion. (App. 35). The district court declined to presume intentional discrimination based on *Amadeo,* found no intentional discrimination in the prosecutor's use of strikes and that the prosecutor's "egregious conduct in *Amadeo* does not alter that conclusion since *Amadeo* concerned the prosecutor's role in the intentional unconstitutional composition of the jury box, but in no way involved striking trial juries – the conduct petitioner complains of." (App 36).

Here, the Eleventh Circuit totally ignored the facts found by the district court, not even acknowledging that Rule 52(a) exists. Specifically, the court first made original factual findings regarding "two incidents" involving the prosecutor, these being the trial of Charley Young and the memorandum in *Amadeo.* (App. 66-69). The panel went on to make extensive findings against Mr. Briley's credibility. (App. 69-70, 78-79). The district court made no credibility findings regarding Mr. Briley.

Further, the Eleventh Circuit itself made factual findings anew as to the statistics themselves. (App. 71-73). The circuit court represented that it was publishing "all the data that is available." (App. 71, fn. 19; 97-102). This is clearly not so as the court failed to publish the table of the 126 noncapital trials. *See* App. 44-51. The Eleventh Circuit made fact findings regarding the prosecutor's use of strikes in each case, fact findings from the 1980 census regarding the percentage of blacks within each respective county, and then recomputed the strike percentages of the prosecutor to reach a different result than had the district court.

"It is well settled, however, that a federal appellate court may set aside a trial court's findings of fact only if they are 'clearly erroneous,' and that it must give 'due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses.' " *Amadeo v. Zant*, 486 U.S. at 223. Here, as in *Amadeo*, there was "no excuse for the court of appeals to ignore the dictates of Rule 52(a) and engage in impermissible appellate fact finding." *Id.* at 228. At the very least, the Eleventh Circuit should be directed by this Court to apply the "clearly erroneous" Rule of 52(a) as mandated by this Court's opinion in *Amadeo*.

C. THE ELEMENTS OF A PRIMA FACIE *SWAIN* CASE.

Based solely upon "the two incidents" discussed above and the percentage of strikes the prosecutor utilized in his cases, with particular emphasis upon those in capital cases, the Eleventh Circuit found a prima facie violation of *Swain*. The Warden asserted below that the analysis under *Swain* must also include an examination of the number of blacks who actually served as jurors before a court may conclude blacks have been effectively disenfranchised from jury service through the prosecutor's use of strikes. The Eleventh Circuit failed to consider whether blacks served as jurors. The Warden submits that this Court should grant certiorari to establish what elements constitute a prima facie case of intentional discrimination under *Swain*.

Aside from *Swain* itself, this Court has never specifically stated what constitutes a prima facie *Swain* case. In *Swain*, this Court observed:

> [W]hen the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, *with the result that* no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance.

Swain, 380 U.S. at 223. (Emphasis added). In *Swain* this Court found that the record as developed was insufficient to show intentional discrimination on the part of the prosecutor because the record did not show that the prosecutor alone was responsible for the fact that no blacks had served on petit juries. *Id.* at 324.

A crucial factual difference between *Swain* and *Batson* is that *Batson* focuses upon the conduct at hand, i.e., the prosecutor's use of strikes in the individual case. Ostensibly, if a timely objection is made, and a prima facie case of discrimination is proven by the defendant, then the trial court may take remedial action at that moment. The question of whether blacks have served in prior cases is not relevant unless it is one of the factors in determining whether a prima facie case of discrimination under *Batson* has been proven.

Swain, however, involves past conduct over a period of time and in a number of trials but also requires an examination of the result of the historic use of strikes.

The Warden submits that focusing solely upon the percentage of strikes used upon blacks is a meaningless statistic unless there is also reference to whether blacks were disenfranchised from jury service as a result. For example, in the Derwin Young trial, the prosecutor used all of his ten strikes on blacks (100 percent), the defense used its entire twenty strikes upon whites, and the jury was evenly split with six blacks and six whites. (App. 53). Thus, focusing solely upon the percentage of strikes used skews the inference to be drawn from that percentage as the resulting jury was evenly split on racial lines.

Further, with reference to parameters of the strike pattern to be considered, this Court only stated in *Swain* that a defendant must show a systematic pattern of exclusion "over a period of time." *Swain*, 380 U.S. at 227. Respondent Horton insisted on including 11 capital cases tried after his trial in 1981, including that of the co-indictee Pless Brown. (App. 52-55). The Warden did not stipulate as to the relevancy of these particular cases (App. 42-43) and in fact objected in the district court to consideration of these cases tried after Respondent Horton's. Rather, the Warden stipulated only as to the accuracy of the numbers and, in anticipation of the numbers being relied upon, utilized those numbers in preparing his rebuttal case. One such case, John Hightower, was tried in 1988, is governed by *Batson*, and the Supreme Court of Georgia found that the prosecutor's reasons for his strikes were sufficiently race-neutral under *Batson*. (App. 52). *See Hightower v. State*, 259 Ga. 770, 773(11), 386 S.E.2d 509 (1989), *cert. den.*, ___ U.S. ___, 111 S.Ct. 230, *rehg. den.*, ___ U.S. ___, 111 S.Ct. 549 (1990). Due to the

scant precedent on *Swain*, there was no authority holding cases tried after Respondent Horton's trial should not be included.

In addition to examining the "strike rate" of the prosecutor, the Fifth Circuit also examined as a component of its *Swain* analysis whether blacks were excluded from jury service as a result of those strikes in *Edwards v. Scroggy*, 849 F.2d 204, 209 (5th Cir. 1988), *cert. den.*, 489 U.S. 1059, *rehg. denied*, 490 U.S. 1032 (1989). The Fifth Circuit found no prima facie *Swain* violation where the facts of that case showed that the prosecutor had used approximately 80 percent of his strikes on blacks, the prosecutor stated in his deposition and hearing testimony that he had "a philosophy of striking the black juror when presented with a choice between a white and black juror and all other factors were equal," but where the resulting overall composition of the juries during the period in question was 28.6 percent black, which was just over 5 percent less than the percentage of blacks who were registered to vote within the district in question.

The district court found as fact in this case that blacks actually served in 122 of the 126 noncapital trials; that of the 4 all-white noncapital trials, only 1 was attributable to the prosecutor's use of strikes; that blacks served as jurors in 25 of the 27 capital trials; that 1 of the 2 all-white capital trials was selected from an all-white venire and that "only in petitioner's case did the prosecutor use his peremptory strikes to eliminate virtually all – nine of ten – black jurors." (App. 35). Thus, the district court deemed it important to examine whether blacks had served as jurors, although not calculating the actual percentages of black and white jurors.

The percentages of blacks serving as jurors can be readily calculated from the stipulated statistics themselves, as evidenced by one of the Warden's exhibits admitted at the evidentiary hearing which was a table showing the racial composition and disposition for 188 cases tried by the prosecutor. In these 188 trials, 33.9 percent of the jurors selected to serve were black and 66.1 percent were white. *See* The Warden's (Respondent below) Exhibit No. B in Section 2 entitled "Racial Composition and Disposition of the Jury Venires (188 trials)."

The Eleventh Circuit noted that the Warden had presented additional statistics to show the prosecutor had a total number of 1,765 available strikes but used only 1,411 strikes and that the prosecutor could have struck an additional 677 blacks but did not. (App. 75). The court discounted these numbers as being an "indicator of the prosecutor's intent" because there could have been other considerations in electing not to strike these additional prospective black jurors. *Id.* at 76.

In this case, the Eleventh Circuit simply focused solely upon the percentage of the prosecutor's strikes upon blacks, and refused to consider their result, in concluding that "race was a very significant factor in Mr. Briley's decision-making process." (App. 77). The Warden submits that this focus solely upon percentages of black jurors struck is more akin to the non-retroactive *Batson* standard than *Swain's* directive to examine both a pattern of cases and whether black prospective jurors were disenfranchised as a result and is a finding of fact not made by the district court.

In 1971, the Fifth Circuit observed that in the six years since *Swain* had been decided, no prima facie *Swain* case had been found. *United States v. Pearson*, 448 F.2d 1207, 1217-18 (5th Cir. 1971). In 1984, the Eighth Circuit announced that it had found only two successful *Swain* claims since *Swain* was decided in 1965. *United States v. Childress*, 715 F.2d 1313, 1316 (8th Cir. 1983). Respondent Horton's case is the third prima facie *Swain* case found by the Eleventh Circuit since this Court decided *Batson* in 1986. *See* also *Jones v. Davis*, 835 F.2d 835 (11th Cir. 1988) (observations of six defense attorney witnesses established a pattern and practice with regard to the prosecutor's strikes and statistical evidence was not necessary); *Love v. Jones*, 923 F.2d 816 (11th Cir. 1991) (*Swain* violation found upon testimony of three lawyers regarding their observation of the prosecutor's use of peremptory strikes; no statistical evidence presented).

In *Allen v. Hardy*, 478 U.S. 255 (1986), this Court held *Batson* would not be applied retroactively on collateral review to convictions which had become final prior to the time *Batson* was announced. It is clear, however, from an examination of these three recent Eleventh Circuit cases that the nonretroactivity bar of *Batson* is being avoided through the application of an increasingly less stringent "*Swain* standard" which focuses solely upon the percentage of jurors struck, as would be applied in a *Batson* case, and without reference to whether blacks actually served in petit juries. For these reasons, the Warden respectfully urges this Court to grant certiorari to stem this evolving erosion of *Swain* and *Allen v. Hardy*.

D. THE *SWAIN* REBUTTAL CASE

As this Court has never set forth the elements of what a prima facie case of discrimination would be under *Swain v. Alabama*, this Court obviously has not discussed what would be a sufficient rebuttal case as well. If the number of black jurors actually serving is not considered as part of whether a prima facie violation has been established under *Swain*, then certainly the percentage of black jurors actually serving should be considered as part of the state's rebuttal case. Here, the Eleventh Circuit found Mr. Briley's explanations of characteristics he sought in jurors not to be credible, although the district court did not reach this issue, and also found that he failed to give specific reasons for his use of strikes at a hearing in 1989 for a trial which occurred in 1981. This was one of the reasons articulated by this court for deciding not to apply *Batson* retroactively. *Allen v. Hardy*, 478 U.S. at 260. (App. 35).

In conclusion, the Warden reiterates that lower courts will be grappling with these issues as *Swain* claims are still being asserted as bases for relief. In light of *Batson's* change in the quantum of proof necessary to establish a prima facie case of intentional discrimination and its contemporaneous application, the temptation to reviewing courts is to ignore *Swain's* "crippling burden of proof" and to eviscerate its requirements. Prosecutors will be asked to give reasons, years after the fact, for their use of strikes, a feat this Court recognized in *Allen v. Hardy* would be virtually impossible as the law at the time of these trials did not put them on notice future explanations would be required. Accordingly, the Warden urges

this Court to grant certiorari to clarify these issues of paramount importance.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHAT FACTORS SHOULD BE CONSIDERED IN ESTABLISHING "INDICIA OF RELIABILITY" TO WARRANT THE ADMISSION OF A CO-CONSPIRATOR'S OUT OF COURT DECLARATION.

The circuit court found that Respondent Horton's Sixth Amendment right to confront the witnesses against him was violated by the admission, under Georgia's co-conspirator exception to the hearsay rule, of the out of court declaration of Pless Brown, through the testimony of Hamp Davis, that Respondent Horton was the trigger-man. Under *Dutton v. Evans*, 400 U.S. 74 (1970), the circuit court found that the co-conspirator's declaration was not sufficiently reliable to have warranted its admission, despite its being corroborated by Respondent's own admission to Davis that Respondent shot the victim. The Warden urges this Court to grant certiorari to clarify that corroborating evidence may be considered by a court to determine the requisite "indicia of reliability" to allow the admission of the co-conspirator's declaration.

The statute in question is Georgia's co-conspirator exception to the hearsay rule, a rule which this Court found in *Dutton* is broader than its federal counterpart because Georgia permits declarations of a co-conspirator made during the concealment phase to be admitted. *Dutton*, 400 U.S. at 81. Because Georgia's rule in O.C.G.A.

§ 24-3-5 was not a "firmly rooted" exception to the hearsay rule, reliability could not be inferred and a declaration is admissible only if it "bears adequate 'indicia of reliability.' " *Ohio v. Roberts*, 448 U.S. 56, 66 (1980); *Dutton*, 400 U.S. at 88.

The district court quoted the testimony of Hamp Davis verbatim in which Davis first testified that on the day after the murder, Respondent Horton had admitted to Davis that Horton was the triggerman. (App. 37-39). The district court then quoted the testimony of Hamp Davis regarding the conversation he had with Pless Brown approximately a week after the incident where Davis walked up to Pless Brown who was at a pool table in a lounge. (App. 39). Davis walked up to Brown and Brown asked if Davis had heard what "your boy" had done; Davis asked if Brown was with "Jimmy, too, man, when that went down"; Brown replied yes and said that "Jimmy did the shooting; he didn't do the shooting." (App. 39). The district court found that Hamp Davis "first testified to Petitioner's admission soon after the shooting of Don Thompson, that he had shot Don Thompson and then testified to a conversation about a week later with Chug (Pless Brown) in which Pless told him Petitioner did the shooting." (App. 40).

The circuit court found that two of the four "factors" of reliability identified in *Dutton v. Evans* were not met in this case. Without discussing all four, the court simply noted that the statement by Pless Brown was exculpatory and was not a declaration against penal interest. (App. 91). This ignores the fact that Brown's admission made him a party to the crime of murder and is clearly a declaration against penal interest. O.C.G.A. § 16-2-20. The

court also found that the statement itself was made "days after the crime while the press was intently following the massive police investigation" that was ongoing and was made while the two men "were drinking together in a bar." (App. 91-92). There is no factual support for these latter observations.

The Warden had urged that the statement bore indicia of reliability because the statement was cumulative of the same admission that Respondent Horton himself had made to the same witness. The circuit court without comment refused to consider this as part of the reliability inquiry and, instead, relegated this to a passing reference in finding the alleged error was not harmless. (App. 92).

This Court recently declined to adopt a "litmus test" to establish the "particularized guarantees of trustworthiness" for the admission of a child's hearsay statements regarding sexual abuse under a state statute which was not a firmly rooted exception to the hearsay rule. *Idaho v. Wright*, ___ U.S. ___, 110 S.Ct. 3139, 3148 (1990). This Court held that the reliability of the statement should be established by relevant circumstances surrounding the making of the statement itself and which show the declarant worthy of belief. *Id.* The Warden would urge this Court to reconsider its decision and allow, as part of the inquiry to establish reliability, examination of other evidence which corroborates the out of court statement of a co-conspirator. In this case such inquiry would include a consideration of the following: Respondent Horton's own admission to Hamp Davis on the day after the murder that Horton shot the victim; testimony of Sherrell Grant that the taller of the two men (Respondent) shot at her with a black-barreled pistol; this black-barreled pistol

was proved to be the murder weapon; and this murder weapon was found in Respondent Horton's apartment. All of these factors establish the reliability of the co-conspirator's statement.

III. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE CREATION OF A PER SE DUTY FOR COUNSEL TO PRESENT MITIGATING EVIDENCE.

In direct contravention of this Court's decision in *Burger v. Kemp*, 483 U.S. 776 (1987), the circuit court created a per se duty under the Sixth Amendment requiring counsel to present all arguably mitigating evidence at the sentencing phase of a capital trial. The court failed to afford any presumption of correctness to the historic facts found by the state courts regarding the actual investigative efforts of defense counsel. The court did acknowledge that the decision not to present mitigating evidence was strategic but, nevertheless, concluded this decision was not reasonable.

The district court deferred the fact findings of the state habeas corpus court which credited the testimony of the two attorneys that they "felt that the facts of this case were not aggravated enough to warrant the death penalty," and that their best strategy was to plant a seed of doubt in the jury's mind as to who was the triggerman. (State Habeas Order, p. 4). With regard to the sentencing phase, the state habeas corpus court found as fact that the attorneys had reviewed Respondent's background with him and did not discover any witnesses who would help their position. *Id.* at 6. Respondent had no employment

records to be produced because he had been in prison until August 1980, and the crime in this case occurred in November 1980. *Id.* The attorneys considered but elected not to call Respondent's common law wife as counsel thought that putting in this type of testimony was a concession to the jury that this was a horrible case. *Id.* at 7. The state court also credited the testimony of the attorneys that at the time of the trial, Respondent's own mother refused to testify for him. The state court credited the attorneys' testimony that their strategy at the sentencing phase was to convince the jury that this simply was not a death penalty case. *Id.* at 7. Most significantly, at the trial itself, Respondent specifically acquiesced in the decision not to present mitigating evidence and indicated he knew of no evidence he would want to present. (T. 1054).

The district court found that the attorneys' strategic decision not to present additional evidence in mitigation was not unreasonable based upon their strategy which was to "leave well enough alone." (App. 27-28). The circuit court, however, found that this decision was unreasonable so that this constituted the first prong of ineffectiveness under *Strickland v. Washington*, 466 U.S. 668 (1984). (App. 86). This decision is directly at odds with *Burger* in which this Court found that an attorney, after reasonable investigation, may make a strategic decision not to present evidence in mitigation.

Having improperly found counsel were ineffective, the circuit court also found prejudice in the form of the typical affidavits of family members and friends produced in habeas corpus proceedings years after the fact. (App. 86-87). These affidavits purport to show that Respondent was a good provider, a good employee, a

good family member and friend. A review of the trial transcript shows that this alleged mitigating evidence would not have withstood the scrutiny of cross-examination by the prosecutor at trial because Respondent is a career criminal who began living with his common law wife in August 1980 when he got out of prison. A reasonable juror would not have found it credible that Respondent was a "good provider" when the offenses in this case occurred three months after he got out of prison. Respondent was arrested in the apartment leased in the common law wife's name while she was at work. Further, to have presented the testimony of numerous family members and friends, who stepped forward after the fact, would have only given the prosecutor another opportunity to reinforce Respondent's extensive criminal history through cross-examination. Finally, although evidence of Respondent's behavior in prison may be "mitigating" to seasoned jurists and may be deemed "mitigating" by this Court so that it may not be precluded from admission at the sentencing phase of a trial, it is highly unlikely that a jury of lay persons in this community would view this evidence as "mitigating." Thus, the circuit court created a per se duty to present evidence whose mitigating value is highly questionable.

CONCLUSION

For all of the above and foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to review the decision of the United States Court of Appeals as the issues presented herein are of paramount importance, particularly the *Swain* issue and its impact.

Respectfully submitted,

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IN THE DISTRICT COURT OF
THE UNITED STATES

FOR THE MIDDLE DISTRICT OF GEORGIA

MACON DIVISION

JIMMY LEE HORTON, Petitioner,	:	
vs.	:	C. A. NO. 88-46-1-
WALTER ZANT, Warden, Respondent.	:	MAC(WDO)

JUDGMENT

(Filed Apr. 12, 1990)

Pursuant to the order of this Court dated and filed April 12, 1990, and for the reasons stated therein, JUDGMENT is hereby entered denying the Petition For Habeas Corpus relief under 28 U.S.C. § 2254.

This 12th day of April, 1990.

GREGORY J. LEONARD,
Clerk

By: /s/ Helen F. Newberry
Helen F. Newberry
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

JIMMY LEE HORTON, Petitioner,	:	
vs.	:	C. A. NO. 88-46-1-MAC
WALTER ZANT, Warden, Respondent.	:	(WDO)

ORDER

(Filed Apr. 12, 1990)

Convicted in Bibb Superior Court of murdering Don Thompson – who was then serving as District Attorney of the Macon Judicial Circuit – and sentenced to die, petitioner Jimmy Lee Horton pursuant to 18 U.S.C. § 2254 petitioned this court for a writ of habeas corpus contending that he is in custody and sentenced to die pursuant to a judgment of Bibb Superior Court obtained in violation of his rights derived from the Constitution of the United States. Before filing in this court his case proceeded in the courts of the State of Georgia on direct appeal and by petition for habeas corpus filed in and denied by the courts of this state.

The state trial judge who presided over petitioner's state habeas hearing afforded petitioner and his counsel a full and fair evidentiary hearing and made extensive written factual findings on each factual issue. As required by 28 U.S.C. § 2254(d):

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit –

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) . . . ;

(5) . . . ;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the

> record as a whole concludes that such factual determination is not fairly supported by the record; . . . .

those presumptively correct findings will be controlling on this court unless petitioner demonstrates one or more of the said statutorily defined circumstances exists. *See Jones v. Newsome, 846 F.2d 62 (11th Cir. 1988).*

A. IMPROPER DENIAL OF NEW SENTENCING HEARING BASED ON NEWLY DISCOVERED EVIDENCE

On October 2, 1981, some seven months after petitioner's trial was concluded, petitioner contended that newly discovered evidence – the testimony of Arthur Fryer that petitioner's co-defendant and accomplice, Pless Brown, three or four days after the shooting admitted to Fryer that he, not the petitioner, had shot Don Thompson – entitled him to a new trial. Allegedly, at the time of trial and thereafter Fryer was a fugitive from justice and therefore unavailable as a witness.

After an evidentiary hearing the trial judge found that petitioner's own evidence shows that petitioner Horton knew of this evidence within three or four days after the shooting of Don Thompson but did not tell either of his court-appointed counsel. (Exhibit 12, p. 70). That factual finding is both presumptively correct and more than fairly supported by the testimony of petitioner and Arthur Fryer. (Exhibit 12, pp. 18, 19, 23, 24, 25). Evidence known to petitioner before trial but not disclosed to his lawyers until after the trial is not newly discovered evidence since it came to petitioner's knowledge before

rather than after trial. *Timberlake v. State, 146* [sic] *Ga. 488, 271 S.E.2d 792 (1980).* Petitioner's constitutional rights were not infringed by the denial of his motion for a new trial and of habeas relief on this ground. *See Taylor v. Illinois, 484 U.S. 400 at 413, 98 L.Ed.2d 798 at 813, 108 S.Ct. 646 at 654,* and cases cited in n. 18 (1988). He is not entitled to habeas relief on this ground.

B. DENIAL OF A FAIR AND IMPARTIAL JURY BY PRETRIAL PUBLICITY

The Georgia Supreme Court denied petitioner's allegation that his motion for change of venue should have been granted saying:

> The trial court did not err in overruling appellant's motion for change of venue. Only two jurors were excused because they had formed fixed opinions as to guilt or innocence from pretrial publicity. Compare, *Waters v. State, 248 Ga. 355(1), 283 S.E.2d 238 (1981).*

249 Ga. at 873, 295 S.E.2d at 284.

In *Waters, at 238 S.E.2d p. 245,* the court had stated:

> "The decision to grant a change of venue lies within the discretion of the trial court, and its discretion will not be disturbed absent an abuse of that discretion . . . The test adopted by this court in determining whether or not a change of venue should be granted is whether the jurors summoned to try the case have formed fixed opinions as to guilt or innocence from unfavorable pretrial publicity." *Patterson v. State, 239 Ga. 409, 418, 238 S.E.2d (1977). Accord, Messer v.*

State, 247 Ga. 316(4), 276 S.E.2d 15 (1981); Jordan v. State, 247 Ga. 328(5), 276 S.E.2d 224 (1981).

Implicit in the Supreme Court of Georgia's ruling on this ground is the court's opinion that taking into consideration that "only two jurors were excused because they had found fixed opinions as to guilt or innocence from pre-trial publicity," the jurors summoned to try petitioner's case had not formed fixed opinions as to guilt or innocence from unfavorable pretrial publicity.

Petitioner, without contesting the court's finding of fact, argues that the Supreme Court of Georgia in so ruling did not have the benefit of the Eleventh Circuit Court of Appeals' 1985 decision in *Coleman v. Kemp, 778 F.2d 1487*, and suggests that as in *Coleman v. Kemp*, publicity in petitioner's case was so prejudicial and inflammatory and so saturated Macon and Bibb County, the community where the trial was held, that prejudice should be presumed. Petitioner urges that his Sixth and Fourteenth Amendment constitutional right to be tried by a panel of impartial, indifferent jurors was thus violated by the trial court's denial of his motion for change of venue. In so arguing, petitioner relies upon *Irwin v. Dowd, 366 U.S. 717, 6 L.Ed.2d 751, 81 S.Ct. 1639 (1961).*

Respondent in his brief points out that petitioner "asks this court to presume prejudice despite the fact that only two jurors out of the array were excused because of fixed opinions based upon pretrial publicity. Respondent submits that the presumed prejudice standard of *Coleman, supra*, is of rare and extreme application and this case does not rise to that level."

Respondent further points out that:

> In his brief before this court, Petitioner argues as "fact" the rank hearsay contents of newspaper articles tendered by trial counsel. It is important to note that initially, trial counsel did not want a change of venue because their pretrial investigation revealed that local citizenry thought the prosecutor was a "fool for doing what he did," that a lot of people counsel talked to did not think this was a death penalty case, and counsel "felt more comfortable in this community, in my community, where the trial was than I would maybe if they had changed venue to some small town where everybody had gone into total shock because somebody had been accused of shooting the DA." State Habeas Transcript, p. 50 (hereinafter designated H.T.). During voir dire, Petitioner expressed dissatisfaction with the jury because he did not think the jurors were being honest so counsel orally moved for a change of venue. *Id.* at 51. Counsel were later permitted to perfect this in writing. *See* Respondent's Exhibit No. 1, p. 78-137. In the instant case, only 2 of 82 prospective jurors (2.4%) who were questioned were disqualified for having formed fixed opinions based upon pretrial publicity. Only 35 of 82 (42.6%) of veniremen who were questioned said they had heard about the case. Compare *Coleman v. State, 237 Ga. 84, 226 S.E.2d 911 (1976), cert. denied, 431 U.S. 909 (1977) (49% excused for prejudice).*

The *Irwin v. Dowd*, 366 U.S. at 723, test which requires that a prospective juror "can lay aside his impression or opinion and render a verdict on the evidence presented in

court," respondent contends, was clearly met in petitioner's case; petitioner had thus shown no actual prejudice.

This trial judge has carefully read this trial and habeas record and likewise carefully again read *Coleman v. Kemp, supra.* In *Coleman,* the record showed newspaper, radio, and television publicity that saturated a small, rural Georgia county and a resulting general public attitude that the defendants were guilty beyond all doubt of the brutal, merciless slaying of the Alday family members and should be sentenced to die. A trial, the people seemed to think, was just "a means to that end."

Petitioner's case is entirely different. The crime occurred in one of Georgia's larger, metropolitan counties having a population of more than 150,000. The victim, shot late at night while investigating the in-progress burglary of his girlfriend's apartment, happened to be serving as Bibb County's district attorney, but at the time was in no way performing his prosecutorial duties. In fact, it was never even suggested that the defendant at the time of the shooting knew or should have known that the victim was the district attorney. The victim died from multiple .22 caliber shots, one of which severed the blood supply to his heart and all of which were fired from some distance. Compared to the Alday slayings and to other Bibb County murders such as by defendants John Eldon Smith and Rebecca Machetti,[1] this shooting in no way

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[1] *See Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982),* and *Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1980), 671 F.2d 858 (5th Cir. 1982), 677 F.2d 20 (5th Cir. 1982).*

was brutal or heartless and the circumstances, while regretful, did not inflame or enrage the entire community.

Petitioner has failed to demonstrate actual prejudice and has likewise failed to establish the extreme circumstances that require this court to presume prejudice. His motion for change of venue was properly denied; he is not entitled to habeas relief on this ground.

C. FAILURE TO CHARGE ON VOLUNTARY OR INVOLUNTARY MANSLAUGHTER

Petitioner's trial counsel requested a jury charge on the lesser included non-capital offense of voluntary manslaughter; the trial judge refused the request; and on appeal the Supreme Court of Georgia affirmed saying:

> A written request to charge voluntary manslaughter must be given if there is slight evidence to support it. *State v. Clay, 249 Ga. 250(1), 290 S.E.2d 84 (1982). See also, Washington v. State, 249 Ga. 728, 292 S.E.2d 836 (1982), and Johnson v. State, 249 Ga. 621, 292 S.E.2d 696 (1982).*
>
> In this case, we are unable to find even slight evidence that appellant acted "as the result of a sudden, violent and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person . . . " *Code Ann. § 26-1102. Compare, Krier v. State, 249 Ga. 80, 94, 287 S.E.2d 531 (1982).* Being discovered during the commission of a burglary is not as a matter of law such provocation as would require a charge on voluntary manslaughter.

249 Ga. at 872, 295 S.E.2d at 283.

That such a charge must be given if there is slight evidence to support it more than satisfies the constitutional requirement that the jury in a death sentence case must be permitted to consider a verdict of guilty of a lesser included non-capital offense, provided that the evidence would have supported such a verdict. *Beck v. Alabama, 447 U.S. 625, 66 L.Ed.2d 392, 100 S.Ct. 2382 (1980).*

Petitioner urges this court to find the "slight evidence" that does require a voluntary manslaughter charge saying:

> A charge of voluntary manslaughter is warranted when the jury could find that the accused acted "solely as the result of sudden violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person." Ga. Code Ann. § 16-5-2(a)(1982). In the present case, the jury could have found provocation from the testimony that the decedent was wielding a loaded gun and the inferences therefrom. The jury could have concluded that Horton shot the decedent not out of malice but out of fear for his life. Such a finding would have supported a verdict of voluntary manslaughter. *Henderson v. State, 234 Ga. 827, 218 S.E.2d 612 (1975).* Although *Horton's trial testimony may have excluded voluntary manslaughter,* the evidence as a whole did not. Footnote omitted; emphasis added.

Respondent vigorously argues that "there is simply no evidence . . . to warrant [such] a charge. . . . "

The Supreme Court of Georgia's 28 U.S.C. § 2254(d) presumptively correct findings of fact state:

> The facts can be summarized as follows: Around 6:00 p.m. of the evening of November 28, 1980, appellant borrowed a pickup truck from a friend on the pretext of needing to move furniture. Later that evening, appellant and Pless "Chug" Brown burglarized the home of Willie James Griffin. The two took a dark-colored H & R .22 caliber pistol, some bullets, a television and a wedding band. Next, appellant and Brown forced their way into the apartment of Sherrell Grant.
>
> Shortly after 11:00 p.m., Sherrell Grant and Don Thompson returned to her apartment. The front door was not fully closed. Ms. Grant pushed the door open and saw that several items of her furniture were missing. They listened and, hearing no noise, decided the burglars had left. As a precaution, however, they went to the apartment next door to borrow a gun, and then, while Ms. Grant waited outside, Thompson entered her apartment.
>
> Ms. Grant noticed that a pickup was backed into a parking place at the end of the parking lot. A black male came around the corner of the apartments and went to the pickup. He was soon followed by a taller black male who, in Ms. Grant's words, " . . . hesitated, like he might have – was going to go back around, but he went on like he was going to walk to the truck. I told him to stop and not to go anywhere. And when I did that, he started shooting at me." Her neighbor pulled Ms. Grant into his apartment and locked the door. They heard a second volley of shots. The neighbor called the police and

> Ms. Grant exited the apartment to look for Thompson. The pickup was gone. Thompson was found slumped over behind the apartment building. The gun he had borrowed had not been fired; the safety was on.
>
> Appellant, who was taller than Brown, returned the pickup to its owner to whom he admitted that he had shot a man. The pistol stolen in the first burglary was recovered from appellant's residence. This was later identified as the murder weapon. The screwdriver used to force open the door to Ms. Grant's apartment was found in appellant's car.

249 Ga. at 871, 295 S.E.2d at 281.

Petitioner does not contend that those findings of fact are not presumptively correct.

Having given due consideration to the presumptively correct findings of fact and having read the entire trial transcript, including in particular the petitioner's testimony in which he in no way contends that either he or his co-defendant, Pless Brown, were provoked by the deceased or anyone else into shooting, it is this court's considered judgment that the slight evidence that would require a voluntary manslaughter charge is absent from the record of petitioner's trial.

Likewise, nothing in the trial record required a charge on involuntary manslaughter.

D. THE CONSTITUTIONAL IMPERMISSIBILITY OF REFUSING TO ADVISE THE JURY THAT PETITIONER WAS SUBJECT TO A MANDATORY TWENTY YEAR'S INCARCERATION ON THE BURGLARY COUNT

During the closing argument the prosecutor argued:

> Now, why did Jimmy Horton kill him? Why did he kill him? That's why he killed him. (Holding up the exhibits admitted during the penalty phase.) He couldn't afford to be caught again. I want you to look at these things when you go back there. This is what you are going to find when you go back there: That on December 11th, 1990 he committed two counts of burglary. He was sentenced on May the 4th, 1971 to six years on each count to run concurrently. The in [sic] 1971, on March the 5th of 1971, after having been sentenced to six years on May the 4th, he was convicted of motor vehicle theft and attempted theft of a motor vehicle. And he got three years on each of those counts to run concurrently with the above sentence.
>
> I want you to notice that. I want you to notice how many chances he has been given. Here he is with two counts of burglary, and two counts of theft, three more counts on a felony there; and he is allowed to serve a total of – 21 years, and he is allowed to serve that out in six years. Now, that's giving a man a break. The system has been so good to him. It has given him every chance in the world to straighten out his life.

(Tr. p. 1077), at which point the following objection, response, and trial court ruling was made:

MR. WALLACE: Your Honor please, I hate to object to Mr. Briley's argument; but he's in effect doing what the law says you can't do. He's in effect referring to parole. I don't think he can do that. I think there's –

THE COURT: I didn't hear the statement he made.

MR. WALLACE: That's in effect what he's saying. He said, well, he got so many years; and then in just – less number of years he's back out on the street doing the same sort of thing again. That's a direct reference to parole; and he can't do that, Judge.

MR. BRILEY: I haven't said anything about parole.

MR. WALLACE: No, no he hasn't used the word. He hasn't used the word. You can say it without using the word. That would be my objection; and I would move for curative instructions.

THE COURT: What did you say, Mr. Briley?

MR. BRILEY: Your Honor, all I said was that he was allowed to serve 21 years in 6 years. But I was referring to the fact that while he had these many cumulative years, that the Court sentenced him concurrently.

THE COURT: Are you talking about prior cases?

MR. BRILEY: Yes, sir.

THE COURT: If he's talking about prior cases – you are not talking about this case –

MR. BRILEY: No, sir.

MR. WALLACE: It just leads into that, though.

MR. BRILEY: But I wasn't even talking about – I was talking about the fact that he was given 21 years but he was allowed to serve it concurrently so that it only amount to six years – which is the maximum sentence.

THE COURT: Well, you are arguing about what has already transpired in the past?

MR. BRILEY: Yes, sir.

THE COURT: I overrule the objection.

(Tr. pp. 1078-1079).

On direct appeal counsel contended that by so ruling the trial court committed constitutional error.

The Supreme Court of Georgia denied relief on this ground, saying:

> 4. In his fourth enumeration of error, appellant contends the trial court erred in refusing to permit him to argue to the jury during the sentencing phase of his trial that since he was a habitual violator, he would have to serve 20 years without parole. *See Code Ann.* § 27-2511. Appellant argues that he was deprived of his right to present this mitigating circumstance to the jury.
>
> The "Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less

than death." *Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1981) (footnotes omitted).* However, nothing in *Lockett v. Ohio* "limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Ibid., fn. 12.*

The policy of this state is not to allow argument or charge on matters concerning parole. *McKuhen v. State, 216 Ga. 172(5), 115 S.E.2d 330 (1960); Code Ann. § 27-2206.* This policy forbids comment with regard to a defendant's inability to make parole, as well as his ability to do so. *Golden v. State, 213 Ga. 481(3), 99 S.E.2d 882 (1957).*

The ability or inability to obtain early release does not relate to a defendant's character, his prior record, or the circumstances of his offense. Thus our state policy forbidding argument about such matters does not run afoul of either the Eighth or Fourteenth Amendments to the U.S. Constitution and the trial court did not err in refusing to allow the argument.

249 Ga. at 873, 295 S.E.2d at 284.

Petitioner argues that his trial counsel in attempting to so argue was merely responding to the prosecutor's improper argument "that petitioner had been placed on parole after serving only six years on prior sentences totaling twenty-one years and improperly implied that petitioner would soon be placed on parole again if he received a life sentence in this case," and was not attempting to argue that the time petitioner would actually serve before parole should be considered as a mitigating circumstance.

Respondent answers that this contention mischaracterizes the prosecutor's argument which did not infer that petitioner would be paroled if he received a life sentence. Respondent further argues that the Supreme Court of Georgia properly applied Georgia's constitutionally sound policy prohibiting argument about parole.

The Supreme Court of Georgia appropriately characterized this portion of the prosecutor's argument as his description of petitioner's past history and merely applied Georgia's longstanding policy of prohibiting argument or charge on matters concerning parole. The Constitution of the United States does not require otherwise. *See California v. Ramos*, 463 U.S. 992, 1013, 77 L.Ed.2d 1171, 1188, 103 S.Ct. 3446 (1983).

E. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURORS THAT THEY COULD DIRECT THAT A LIFE SENTENCE ON THE MURDER CHARGE RUN CONSECUTIVELY TO PETITIONER'S SENTENCE FOR BURGLARY

Petitioner's jury could not have directed that a life sentence on the murder charge, if imposed by the jury, was to run consecutively to the sentences to be imposed by the trial judge for burglary because as a matter of state law "the jury may make a binding recommendation of life or death, [but] it does not impose the sentence." *Spivey v. State*, 253 Ga. 187 at 192, 319 S.E.2d 420 at 428. It, therefore, was not a constitutional error for the trial judge to fail to instruct them that they could direct that a life sentence on the murder charge was to run consecutively to petitioner's sentence for burglary.

F. INEFFECTIVE ASSISTANCE OF COUNSEL

(1) Pretrial
(2) Trial

Petitioner alleges that his court-appointed counsel, Hugh A. Wallace and John E. Simmons, failed to provide the effective assistance of counsel that the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States guarantee to him. In particular, he alleges the following deficiencies:

(1) Pretrial

(a) Lack of a thorough investigation of the facts and scientific evidence exacerbated by the trial court's failure to pay a ballistics expert to assist counsel and by counsel's failure to particularize the specific items an investigator was needed for and the cost. (Habeas Petition, par. 46-50).

(b) Incompetently filing and pursuing a motion to suppress petitioner's confession. (Habeas Petition, par. 51-52).

(c) Failure to move for a change of venue except in a perfunctory manner during the trial and failure to move for a continuance. (Habeas Petition, par. 53-54).

(2) Trial

(a) Inadequate opening statement. (Habeas Petition, par. 55).

(b) Counsel's admitted inability to meaningfully cross-examine the State's ballistics expert. (Habeas Petition, par. 56).

(c) Failure to introduce readily available evidence to challenge Sherrell Grant's testimony that she was able to recognize the color of the barrel of the gun fired at her. (Habeas Petition, par. 57).

(d) Failure to object to the strongly prejudicial hearsay testimony of Hamp Davis that co-defendant Pleas Brown – who was not a witness for either side and who received a separate trial – told him that petitioner Horton did the shooting and he, Brown, did not. (Habeas Petition, par. 58).

(e) Incompetent closing argument. (Habeas Petition, par. 59).

(f) Failure to object to prosecutor's personal feelings for the decedent in the guilt-innocence phase of closing argument (Habeas Petition, par. 60) and flagrantly improper, misleading appeal to passion, prejudice, and other arbitrary factors of closing argument during the sentencing hearing. (Habeas Petition, par. 63).

(g) Failure to introduce any evidence during the sentencing hearing. (Habeas Petition, par. 62).

(h) Incompetent closing argument for defendant during sentencing hearing. (Habeas Petition, par. 64).

(i) Failure to object to failure of trial court to instruct the jury more fully about mitigating circumstances. (Habeas Petition, par. 65).

(j) Failure to constitutionally challenge the state's procedure for granting a new trial on the grounds of newly discovered evidence. (Habeas Petition, par. 66).

In his petition and his brief petitioner refers to the particular part of the record that supports these allegations. Respondent, by answer and brief, vigorously disputes each of these allegations, relying on the six pages of presumptively correct historical facts found by the state habeas judge. (Habeas Order, pp. 3-8).

In considering petitioner's allegations of ineffective assistance of counsel this United States district judge has read the entire trial and habeas transcript and independently determined that the record fully supports the historical facts found by the state habeas court. The presumption of their correctness controls. *Sumner v. Mata*, 455 U.S. 591, 71 L.Ed.2d 480; 102 S.Ct. 1303 (1982).

The landmark Supreme Court decision in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984), controls the disposition of these claims. Note the following portions of that decision:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in

the adversary process that renders the result unreliable.

* * *

When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.

More specific guidelines are not appropriate. . . . The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

* * *

In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . .

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to secondguess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac, 456 U.S 107, 1330134, 71 L.Ed.2d 783, 102 S.Ct. 1558 (1982).* A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of

reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *See Michael v. Louisiana, supra, at 101, 100 L.Ed. 83, 76 S.Ct. 158.* There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . .

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

* * *

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison*, 449 U.S. 361, 364-365, 66 L.Ed.2d

564, 101 S.Ct. 665 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

* * *

Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, *United States v. Agurs*, 427 U.S., at 104, 112-113, 49 L.Ed.2d 342, 96 S.Ct. 2392, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, *United States v. Valenzuela-Bernal, supra, at 872-874, 73 L.Ed.2d 1193, 102 S.Ct. 3440.* The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

* * *

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was

> deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. . . .
>
> * * *
>
> Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at ___.

In applying *Strickland v. Washington* to petitioner's case, it is important to keep in mind that from beginning to end petitioner's case was tried under Georgia's Unified Appeal in death penalty cases procedure, *see 246 Ga. App.; 1933 Ga. Code Ann. 27-2538; 1981 Ga. Laws p. 1532,* by virtue of which the presiding trial judge at each step of the trial – using a checklist containing possible constitutional problems – conferred with all counsel and the defendant to determine whether or not there were any constitutional issues that could or should be raised and to determine whether or not the petitioner was satisfied with his counsels' performance. That procedure, as the Supreme Court of Georgia found,

> benefits the criminal defendant against whom the death penalty is sought by insuring that all state and federal rights available to him are made known to him. See "Statement of Purposes," 246 Ga. A-5. There is no sanction more serious which can be imposed on a criminal defendant than the taking, by the State, of his life. The Unified Appeal Procedure is designed to protect the criminal defendant in this potentially precarious situation during each phase of the judicial process which may ultimately result in a conviction and sentence of death.

Sliger v. State, 248 Ga. 316, 318, 282 S.E.2d 291, 293 (1981).

Of necessity, *pro bono* habeas counsel, because of their professional obligation to fully and adequately represent petitioner by asserting every possible constitutional error that might "short circuit" the fate that awaits petitioner, has "fly specked" trial counsel's performance using an overabundance of hindsight and submitted a "laundry list" of everything that trial counsel could possibly have done but failed to do and of everything counsel did but should have done better, differently, or not at all. In spite of the admonition that this court should not utilize hindsight in evaluating counsel's performance, *Zamora v. Duggar, 834 F.2d 956 (11th Cir. 1987)*, it would be unrealistic to expect habeas counsel to refrain from urging the court to do so.

The historical facts as found by the habeas court begin by noting that "at the time counsel was appointed, December 15, 1980, Petitioner and his co-indictee, Pless Brown, had both made statements to the police containing admissions and implicating each other in both the burglaries and the murder." (Habeas Order, pp. 3-4).

Counsel "knew that what the State's ballistics expert was saying confirmed what Petitioner's story was, *i.e.*, that the gun taken from Petitioner's apartment was the murder weapon." (Habeas Order, p. 5).

The shooting took place late at night. There was no eyewitness to the actual shooting other than petitioner Horton who testified and co-defendant Pless Brown who did not testify at petitioner's trial. Petitioner admitted he had a pistol and had fired it, but denied he shot the deceased; the pistol found in petitioner's bedroom and shown by ballistics tests to be the murder weapon, strongly suggested otherwise. The owner of the truck that petitioner and his co-defendant borrowed and used in the burglaries told the police that he loaned them his truck and that petitioner admitted shooting the deceased. Counsel wee [sic] thus given the unenviable, almost impossible task of "defending the indefensible." Considering all the circumstances, their representation, while not text book perfect, was in all respects reasonable.

In particular, trial counsel in the pre-trial stage prepared for trial in the usual professional manner by filing and pursuing pre-trial motions, interviewing the petitioner, interviewing witnesses, inspecting the scene, and getting access to the prosecuting attorney's entire file. Counsel asked for investigative and ballistics expert assistance but was unable to suggest how either an investigator or a ballistics expert would possibly contribute to the defense. Habeas counsel fault trial counsel for failing to make such a showing, but in no way particularize or specify what counsel could have shown. Trial courts are not constitutionally required to appoint identical experts for the defense to balance the scales or to "even the

score." *Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988).* Trial counsel could hardly be faulted for failing to convince the trial court to appoint an investigator or ballistics expert the trial court was not constitutionally required to appoint.

As a matter of trial strategy trial counsel saw no reason to move for a change of venue. As the habeas judge found, counsel "felt comfortable with the case being tried in Bibb County, despite the publicity . . . he felt more comfortable in this community than he would have felt in ' . . . some small town where everybody had gone into total shock because somebody had been accused of shooting the D.A.' " Upon hearing the responses of potential jurors and petitioner's feelings that jurors were being untruthful, counsel then orally moved for change of venue. The initial decision not to move for a change of venue and the subsequent decision to orally make such a motion were obviously trial strategy decisions which in no way indicate that counsel's performance was less than reasonable under the circumstances.

Counsel's trial objective was to try to convince the jury that petitioner aided and abetted Pless Brown in the burglaries and fired pistol shots in the air but did not actually shoot Don Thompson. While two plus two always equals four, no particular opening or closing argument, evidentiary objections, cross-examination of prosecution witnesses, or trial strategy guarantee that the guilty will be found innocent or receive a sentence less than death. All that trial counsel can do is perform reasonably well considering the circumstances, and that trial counsel did. Habeas counsel differs with this conclusion, arguing in particular that counsel presented no additional

evidence during the sentencing phase. This overlooks the fact that counsel evaluated the situation and concluded that petitioner had nothing to gain from the presentation of additional evidence. Their trial strategy was "to leave well enough alone." That was most reasonable under the circumstances. Petitioner has failed to show that trial counsel's performance was deficient.

More importantly, habeas counsel has totally failed to show that trial counsel's performance, if deficient, prejudiced the defense – "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington, supra,* at L.Ed.2d p. 698. Common sense indicates that the result of petitioner's trial would be no different even if the case had been tried in the text book perfect manner suggested by habeas counsel.

G. DENIAL OF DUE PROCESS BY IMPROPER ADMISSION OF EVIDENCE OF PETITIONER'S PRIOR INCARCERATIONS AT GUILT-INNOCENCE PHASE

H. CONSTITUTIONAL IMPERMISSIBILITY OF BASING DEATH PENALTY ON SOLE AGGRAVATING CIRCUMSTANCE THAT MURDER COMMITTED IN THE COURSE OF A BURGLARY

I. INSUFFICIENCY OF EVIDENCE TO SUPPORT SOLE AGGRAVATING CIRCUMSTANCE THAT PETITIONER WAS ENGAGED IN THE COMMISSION OF BURGLARY WHEN THE MURDER WAS COMMITTED

For the reasons stated in respondent's brief, there is no merit in either of these allegations of constitutional error.

J. IMPROPER CLOSING ARGUMENT BY THE STATE AT THE PENALTY PHASE

Petitioner contends that the prosecuting attorney in his sentencing phase closing argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process," *Darden v. Wainwright, 477 U.S. 168 at 181, 91 L.Ed.2d 144 at 157, 106 S.Ct. 2464 at ___ (1986),* by "improperly appeal[ing] to the juror's fear that petitioner might escape and kill again if sentenced to life imprisonment", " . . . by suggesting that petitioner would again soon be out on parole if not sentenced to death . . . ," by stressing that the demand for the death penalty results from the prosecutor also valuing all human life and by inviting the jury to impose the death penalty and send a message that this community will not tolerate killings.

In evaluating petitioner's contentions, this court has carefully read the closing sentencing phase arguments of the prosecuting attorney (Tr. pp. 1069-1090) and the petitioner's attorney (Tr. pp. 1090-1111) and also read the court's sentencing phase jury charge (Tr. pp. 1112-1118) to be in position to evaluate petitioner's constitutional claim of fundamental unfairness in light of the totality of the circumstances. *Tucker v. Kemp, 802 F.2d 1293 (11th Cir. 1986).* Having done so, it is this court's considered judgment "when the record of the entire sentencing proceeding is reviewed, [it demonstrates] . . . that the jury was fully apprised of, and appreciated, the decision that it alone had to make – whether to impose a sentence of death or one of life imprisonment. The prosecutor's improper comments, in light of his entire argument, defense counsel's argument, and a proper instruction

from the court, did not render the sentencing proceeding fundamentally unfair. . . . " *Id at 1297.*

K. REFUSAL TO INSTRUCT JURY THAT VICTIM'S POSITION AS DISTRICT ATTORNEY WAS NOT AN AGGRAVATING CIRCUMSTANCE

L. DENIAL OF FAIR CROSS-EXAMINATION REQUIREMENT BY UNDER-REPRESENTATION OF YOUNG ADULTS

Petitioner contends that identification of the victim and reference to the victim in argument as the district attorney was in effect the victim impact evidence that the Supreme Court in *Booth v. Maryland, 482 U.S. 496, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987),* said was constitutionally impermissible in a death penalty case. With due respect to that contention, the identification of petitioner's victim as the district attorney and the mention in argument of his having been district attorney is not a victim impact statement. It is nothing more than a description or identification of the victim. *Booth v. Maryland* in no way proscribes so describing and mentioning the victim.

In his amended state habeas petition, petitioner stated in paragraph 126 that prior to indictment he challenged the venire from which the grand jury was chosen on the ground that as stipulated 18 to 23 years olds constituted 9.38 percent of Bibb County's population, but only 4.2 percent of the grand jury; that 18 to 23 year olds constituted a cognizable group; and that their underrepresentation constituted a constitutional deficiency.

The trial transcript shows that before indictment petitioner challenged the array from which the grand jury was to be drawn on the grounds that cognizable groups of 18 to 23 year old young adults and 24 to 39 year olds were excluded therefrom. (Respondent's Exhibit 1, p. 14; Exhibit 5, p 21). That motion was heard and denied on January 28, 1981 (Respondent's Exhibit 6, p. 10, *et seq.*), at which time petitioner withdrew his contention as to 24 to 39 year olds and then as to 18 to 23 year olds presented evidence (Respondent's Exhitib [sic] 6, pp. 11-55), none of which establishes that 18 to 23 year olds are a cognizable group. *See Willis v. Kemp, 838 F.2d 1510 at 1516.*

Upon appeal to the Supreme Court of Georgia the denial of that motion was not enumerated as error. In his state habeas, however, petitioner asserted he should now be afforded funds to hire an expert to conduct a survey that would prove what he had the opportunity to but did not prove before trial. The state habeas court denied that request. No showing having been made to this court that such an expert would do anything other than engage in a "fishing expedition," this court declines to appoint or pay such an expert.

No error was committed by the courts of this State in denying said motion or the request for funds to pay an expert.

M. THE PROSECUTOR'S SYSTEMATIC PRACTICE OF USING PEREMPTORY CHALLENGES TO STRIKE BLACKS FROM PETITIONER'S AND OTHER JURY PANELS

Petitioner was tried in 1981. When his jury was selected, the district attorney used his ten peremptory

strikes to eliminate nine black and one white juror; petitioner's attorney struck one black, thirteen white, and eight jurors of unknown race; and petitioner was tried by an all-white jury. While no objection to the prosecutor's striking nine black jurors was made at trial, petitioner in his state habeas petition did assert that his Equal Protection Clause rights were violated by the prosecutor systematically striking black jurors in petitioner's and in other cases, all contrary to the teaching of *Swain v. Alabama, 380 U.S. 202, 23 L.Ed.2d 759, 85 S.Ct. 824 (1965).*

In reviewing a prior decision of this court on a *Swain* claim, the Eleventh Circuit Court of Appeals stated:

> Petitioner's second claim is that the prosecutor violated petitioner's rights under the equal protection clause of the fourteenth amendment by intentionally and systematically using peremptory challenges to exclude blacks from petit juries, including petitioner's. The standard controlling the resolution of this claim is that of *Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).*[13] Under *Swain*, a petitioner can establish a *prima facie* equal protection violation if he proves that
>
> "the prosecutor . . . , in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of [blacks] who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no [blacks] ever serve on petit juries."
>
> *Id.* at 223, 85 S.Ct. at 837. We have held that *Swain* does not require a petitioner to prove that a prosecutor used his peremptory challenges to

exclude blacks from petit juries "one hundred percent of the time." *United States v. Pearson, 448 F.2d 1207, 1217 (5th Cir. 1971).*[14] Nevertheless, we have also recognized that a petitioner raising a *Swain* claim "bears a heavy burden when he seeks to show systematic discrimination of constitutionally significant proportions." *United States v. Brooks, 670 F.2d 148, 151 (11th Cir.) (quoting Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980), cert. denied, 457 U.S. 1124. 102 S.Ct. 2943, 73 L.Ed.2d 1339 (1982).*

* * *

The prosecutor's striking of all black jurors and alternates in petitioner's trial, creating an all-white petit jury, does not, by itself, establish a *Swain* violation. *See Brooks, 670 F.2d at 151; United States v. Jones, 663 F.2d 567, 572 (5th Cir. Unit B Dec. 1981).*[15] Petitioner must also show a systematic or historical use of the peremptory challenge to exclude blacks from petit juries. . . .

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[13] We note that *Swain* has been overruled by *Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).* The Supreme Court subsequently declared, however, that "*Batson* should not be applied retroactively on collateral review of convictions that became final before our opinion [in *Batson*] was announced." *Allen v. Hardy, 478 U.S. 255, 106 S.Ct. 2878, 2880, 92 L.Ed.2d 199 (1986).* Because petitioner's conviction became final within the meaning of *Allen, see id. at 1856 n. 1, 106 S.Ct. at 2880 n. 1,* seven years before *Batson* was decided, *Batson* is not applicable to this case and the *Swain* analysis applies.

[14] In *Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc),* this court adopted as

> binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.
>
> [15] In *Stein v. Reynolds Securities, Inc., 667 F.2d 33 (11th Cir. 1982)*, this court adopted as binding precedent all decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981.

Willis v. Kemp, 838 F.2d 1510, 1518 (1988, cert. denied, 103 L.Ed.2d 596 (1989).

The specially appointed prosecutor was the District Attorney of the Ocmulgee Judicial Circuit which includes the counties of Baldwin, Greene, Hancock, Jasper, Jones, Morgan, Putnam, and Wilkinson. Petitioner's trial took place in Bibb County, which is part of the Macon Judicial Circuit.

To support petitioner's *Swain* claim, petitioner's attorneys, assisted by an investigator, compiled information on jury strikes used by the prosecutor from his appointment as district attorney on January 20, 1974, until the present time. That resulted in the submission to the court of stipulated factual information as to jury strikes used by the prosecuting attorney in non-capital cases (Petitioner's Exhibit 1) and capital cases (Petitioner's Exhibit 2). Copies of each are attached hereto as Attachments A and B.

Petitioner's Exhibit 1 (Attachment A) shows how the prosecuting attorney used his peremptory strikes in non-capital cases tried in Baldwin, Greene, Jasper, Jones, and Wilkinson counties from 1974-81, and Exhibit 2 (Attachment B) shows the same for capital cases tried in the same plus Bibb and Putnam counties. Information on cases tried in Hancock and Morgan counties was not presented.

Note that according to Attachment A petitioner's prosecutor personally selected juries in 126 non-capital cases tried during an eight year time period; in doing so he peremptorily struck 790 black and 390 white jurors – six were not identified by race – while defense attorneys struck 495 black and 1,630 white jurors – fifteen were not identifiable. Of the 126 non-capital cases only four were decided by all-white juries. Those were in Jones County, and in three of the four the defense attorneys struck more black jurors than the prosecutor struck. The prosecutor was thus responsible for one of 126 trial juries in non-capital cases being all-white. Note further that only seventeen of the 126 non-capital juries had just one black juror. One hundred and five of the 126 non-capital juries selected by petitioner's prosecutor thus had more than one black juror.

Attachment B shows 27 capital cases in which juries were selected by petitioner's prosecutor. Only two of the 27 had all-white juries – petitioner's and Rebecca A. Machetti's – and only in petitioner's case did the prosecutor use his peremptory strikes to eliminate virtually all – nine of ten – black jurors. The Machetti case jury was selected from an all-white jury panel, so the prosecutor could not causally be found responsible therefor. Of the 27 juries, four had only one black member; the remainder had between two and eight black members.

Petitioner also urges the court to find that the prosecutor's discriminatory conduct in *Amadeo v. Kemp, 486 U.S. 214, 100 L.Ed.2d 249, 108 S.Ct. 1771 (1988)*, coupled with Attachments A and B shows a pattern and practice from which this court can find "an intent on the part of the prosecutor 'to deny the Negro the same right and

opportunity to participate in the administration of justice enjoyed by the white population,' " citing *Swain, 380 U.S. at 222.*

Respondent in his post-hearing brief (p. 5) points out that "*Swain* requires a showing of historic and systematic exclusion of blacks . . . " and that "only after a *prima facie* case of systematic exclusion has been shown under *Swain* are the prosecutor's motives subject to question. *United States v. Leslie, 783 F.2d 541 (5th Cir. 1986) (en banc)*" Having done so, respondent argues that petitioner has failed to establish a *prima facie* case.

Petitioner's obvious problem is that the stipulated facts do not show that the prosecuting attorney has historically and systematically excluded blacks from serving on trial juries. The facts show only that the prosecutor struck black jurors more often than white jurors – 67% of his strikes – leaving black jurors on the jury in virtually all but petitioner's case. That is not the historic, systematic exclusion contemplated by *Swain*. The prosecutor's egregious conduct in *Amadeo* does not alter that conclusion since *Amadeo* concerned the prosecutor's role in the intentional unconstitutional composition of the jury box, but in no way involved striking trial juries – the conduct petitioner complains of.

Petitioner's *Swain* claim is **DENIED.**

N. THE CONSTITUTIONAL IMPERMISSIBILITY OF ADMITTING HEARSAY TESTIMONY AS TO STATEMENTS OF PLESS BROWN THAT PETITIONER FIRED THE FATAL SHOTS

Petitioner alleges that the confrontation clause of the Sixth Amendment was violated by Hamp Davis' testimony "that Pless Brown told him several days after the offense that Jimmy Horton did the shooting and that he (Brown) did not." (Tr. 743). Pless Brown, Jr., petitioner's co-defendant, did not testify at petitioner's trial. Petitioner thus had no opportunity to cross-examine his accuser about the statements he purportedly made." (Petitioner's Memorandum of Law, p. 58).

For reasons not apparent, petitioner's attorneys cite *Douglas v. Alabama, 380 U.S. 415 (1965)*, and *Bruton v. United States, 391 U.S. 123 (1968)*, in support of this contention without even mentioning or attempting to distinguish the 1970 decision of the Supreme Court of the United States which held that Georgia's evidentiary rule which was the basis for the admission of this testimony, does not violate the Constitution of the United States. *Dutton v. Evans, 400 U.S. 74, 27 L.Ed.2d 213, 91 S.Ct. 210 (1970)*. Respondent, of course, mentions and relies upon that decision.

The testimony of Hamp Davis begins at page 737 of the trial transcript. He knows petitioner Horton and Pless Brown. Friday morning, November 28, 1980, petitioner and Pless Brown came by his house which is about two blocks from the Sundown Club (Montpelier and Pio Nona Avenues). They were riding in a girlfriend's car, came in the house, had a beer, stayed about 15 minutes, and left.

Petitioner came back that evening and borrowed his truck, saying he had to move some furniture. He saw his truck again the next morning when he left to go rabbit hunting and found the truck parked in his yard with the keys in the ignition. Close to dark that evening, petitioner and his girlfriend came by his house. He and Jimmy, the petitioner, had a conversation as to which he testified:

> Q Did you have any conversation with Jimmy at that time?
>
> A Yeah.
>
> Q What did y'all talk about?
>
> A That's when he told me about what happened the night before.
>
> Q Did you ask him what happened?
>
> A No. When he came in, he told me. He asked me had I heard what went down, you know. And that's when I asked him you know, you mean to tell me that was you did that?
>
> Q What was his reply to that?
>
> A It was either me or him, you know. He said he had got shot at; and when he was going down he shot back.
>
> Q Run that past me again. He said what now?
>
> A He said the man had shot at him; and when he was going down, he shot back at him.
>
> Q He didn't say what he meant by going down, did he?
>
> A Well, he demonstrated, you know, going down like this and shooting back, you know.

Q And that was Jimmy Horton said he shot back?

A Yes.

Q Said he shot at me; and it was him or me?

A Yeah.

(Tr. pp. 742-3).

The direct examination then focused on the complained of testimony:

Q Did you see – did you have an occasion to see Chug after this time when you saw Jimmy?

A No. It was about a week later when I saw Chug.

Q And where did you see him?

A At the Sundown Club.

Q And what was Chug doing when you saw him?

A Standing around a pool table.

Q Did you have any conversation with him?

A I just walked up to him. Then he asked me, he said, you heard what your boy has did? You know, and I said you mean to tell me you was with Jimmy, too, man, when that went down? He told me yeah.

Q Did he say anything else?

A He told me Jimmy did the shooting; he didn't do the shooting.

Q Do you remember the words he said?

A He just told me, you know, he didn't do the shooting; Jimmy did the shooting.

Q Pless Brown said that?

A Yeah.

(Tr. p. 743).

So it is that the witness first testified to petitioner's admission soon after the shooting of Don Thompson, that he had shot Don Thompson and then testified to a conversation about a week later with Chug (Pless Brown) in which Pless told him petitioner did the shooting.

Georgia's evidentiary rule permits the testimony of the witness as to his conversation with Chug since it occurred while the conspiracy to conceal the fact that a crime has been committed and the identity of the perpetrators continued. That rule does not violate the Constitution of the United States. *Dutton v. Evans, id.*, and petitioner's claim must therefore be **DENIED.**

CONCLUSION

All of petitioner's contentions having been carefully considered, it is this court's judgment that petitioner Jimmy Horton has been constitutionally tried, convicted, and sentenced to die.

Petitioner's application for a writ of habeas corpus is therefore **DENIED** in its entirety, this 12th day of April, 1990.

/s/ Wilbur D. Owens, Jr.
WILBUR D. OWENS, JR.
UNITED STATES DISTRICT JUDGE

WDOjr:lab

Pet. Exhibit #1

ATTACHMENT A

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

JIMMY LEE HORTON, Petitioner, v. WALTER ZANT, Warden Georgia Diagnostic & Classification Center, Respondent.	Civil No. 88-46-1-MAC (WDO)

STIPULATION OF JURY STRIKE INFORMATION

Petitioner and Respondent, through counsel, hereby stipulate to the accuracy of the attached summary of records of the use of peremptory challenges by the State and defense counsel in criminal cases tried by District Attorney Joseph Briley in the counties and for the time periods indicated without stipulating to the relevancy or admissibility of any of said information.

Exhibit 1 contains the jury strike information for five counties in the Ocmulgee Judicial Circuit from 1974, when Mr. Briley was [sic] first became District Attorney, to 1981, when Mr. Briley prosecuted the State's case against petitioner Jimmy Horton in the Superior Court of Bibb County. Only cases actually tried by Mr. Briley are included. Jury strike information in cases tried in the

other three counties in the Circuit was not available and therefore is not included.

The exhibits provide the name of the defendant for each case, the race of the defendant if known, the year of the trial, a breakdown by race of the peremptory strikes used by the District Attorney and the defense at the trial, and the racial breakdown of the resulting jury.

The parties stipulate that the attached summaries are true and correct for purposes of this case only.

So stipulated this 8th day of Oct., 1989.

/s/ Stephen B. Bright
Counsel for the petitioner

/s/ Paula K. Smith
PAULA K. SMITH
Assistant Attorney General
Counsel for the respondent

JOSEPH BRILEY JURY STRIKES IN NON-CAPITAL CASES – 1974-81

BALDWIN COUNTY

Defendant, Race, Year		Prosecution B-W-U	Defense B-W-U	Jury B-W-U	Alts B-W-U
Adams	'74	1-8-1	1-0	5-7	
Reeves	'74	7-2	7-13	7-5	
Saunders	'74	6-2	4-16	3-9	
Reeves (B)/ Carroll (B)/ Johnson (B)	'74	9-0	2-14	8-4	
Mason (B)	'75	7-1	4-18	5-7	
Simpson	'75	8-0	0-17	6-6	
Ware (W)	'75	1-7	4-15	4-8	
Warren	'75	5-5-1	0-17	3-9	2-0
Reeves	'75	8-1	4-15	4-8	
Connell	'75	4-3	4-9	4-8	
Harden (B)/ Francis	'75	7-3	3-17	6-6	
Myers	'75	0-2	6-7	6-6	

Clemons (B)	'75	(No Strike Activity Recorded)		4-8	
Herrin ( )	'75	6-3	3-14	4-8	
Decker (W)	'75	1-4	3-5	4-8	
Harrison (W)	'75	1-8	4-13	8-4	
Dennis (B)	'75	4-1	4-15	2-9	
Ussery (W)	'75	2-4	5-15	5-6-1	
Stone (B)	'75	5-4	3-17	8-4	
Jackson (B)	'75	2-3	5-14	8-4	
Harris (B)	'75	4-1	1-15	5-7	
Studstill (W)	'75	1-5	1-5	4-8	
Ingram (B)	'75	6-3	8-11	1-11	
Herin (W)	'75	(No Strike Activity Recorded)		4-8	
Jones (B)/ Duke (B)	'75	2-4	6-10-1	3-9	
Fleming (W)	'75	4-2	6-13	5-7	0-2
Goodard (W)	'75	5-2	0-13	3-9	
Fleming (W)	'75	6-3-1	5-15	3-9	1-1
Hooks (B)	'76	7-0	1-8	3-9	
Yarbrough (B)	'76	9-0	2-16	8-4	
Payne (B)	'76	6-2	1-18	5-7	
Wine (B)	'76	5-0	3-17	4-8	

Page	'76	8-2	6-12	4-8
Thompson	'76	5-1	0-11	3-9
Tidwell	'76	8-1	2-12	5-7
Page 2 [sic]				
Miller	'80	8-2	0-19	4-8
Myers (W)	'80	5-6	5-17	6-6
Marshall (B)	'80	7-1	0-20	6-5-1
Simmons (B)	'80	10-0	1-19	2-10
Wilson (B)	'81	10-1	4-19	2-9-1
Collins (B)	'81	9-0	2-21	3-9
Fraley (B)/ Fraley (B)	'81	11-0	0-25	3-9
Fraley (B)	'81	12-0	0-17	6-6
Barlow (B)	'81	6-4	10-10	4-8
Wright (B)/ Adams (B)	'81	10-1	0-19	3-8-1
Parkham (B)	'81	8-1	9-6	3-9
Total	46	461-164-3	213-912-1	

GREEN COUNTY

Defendant, Race, Year		Prosection B-W-U	Defense B-W-U	Jury B-W-U
Harris (B)	'74	4-1	3-5	4-8
Allen (B)	'74	(No Strike Activity Recorded)		3-9
Chester	'74	4-1	2-4	1-11
Meadows	'74	1-8	5-9	5-7
Champion	'75	1-5	8-4	1-11
Smith (B)	'75	5-0	3-16	3-9
Hill (B)	'74	6-0	3-8	4-8
Smith (B)	'74	9-1	4-12	1-11
Little (B)	'75	1-3	6-12	3-9
Mumford (B)	'76	10-0	1-18	4-8
Briscoe (B)	'77	9-2	8-12	4-8
Callaway (B)	'78	5-0	0-0	1-11
Clifton	'78	7-0	1-6	2-10
Swain (B)	'77	4-1	6-0	3-9
Fulton (B)	'80	4-0	3-4	5-7
Burgess (W)	'79	4-0	12-11	5-7
Totals	16	74-22	65-121	

JASPER COUNTY

Defendant, Race, Year		Prosection B-W-U	Defense B-W-U	Jury B-W-U
Strother (W)	'74	2-3	6-1	1-11
Hampton	'75	6-4	7-3	2-10
Cole/Cole/ Gable/Crum/ Bridges/Daniels		7-3	7-18-1	7-5
Ross (B)	'77	6-2	0-16	1-11
Swett (W)	'77	3-5	11-3	4-8
Tyler (W)	'78	2-5	5-11	8-4
Scott/Gober (W)	'78	7-0	5-4	5-7
Plunkett	'78	4-1	1-6	3-9
Thurman (B)	'78	5-4	4-15	9-2-1
Lancaster		2-3	2-5	4-8
Kwapinski (W)	'79	2-8	8-10-1	4-7-1
Tucker		(No Record)		
Sanford (W)	'82	1-0	2-6-1	10-1-1
Capps (W)	'80	7-0-1	3-10	7-3-2
McCullel (W)	'80	4-1	1-6	6-4-2
Jordan		(No Record)		
Total	12	58-45-1	62-114-2	

JONES COUNTY

Defendant, Race, Year		Prosection B-W-U	Defense B-W-U	Jury B-W-U
Shadburn (W)	'73	2-4	3-14-1	2-10
Rowe	'74	1-5	6-2-1	0-12
Wave	'74	4-3	4-11	4-8
Woodward	'74	1-3	6-13	1-11
Phelps (B)	'74	0-1	0-6	2-9-11
Emery	'74	0-2	2-13	4-8
Pitts	'74	0-0	0-0-1	1-11
Green (B)	'75	9-0	4-14	3-9
Hill (B)	'75	5-0	2-15	2-10
Patterson (B)	'75	8-3	0-19	0-12
Glover (B)/ Lester (B)/Burt	'75	1-3	1-4	3-9
Flanders (W)	'75	0-5	4-2	5-7
Mauldin	'75	0-3	2-5	5-7
Kitchen	'76	5-3	0-19	4-8
Little	'76	9-1	1-18-1	1-11
Crisp	'76	5-4	2-14-2	6-6
Holland	'76	7-1	2-16	1-11
Brantley	'76	7-2	4-12	1-11
Hollings	'76	1-2	6-8	1-11

Reece (W)/ Bland (B)	'76	1-4	6-6	4-8
Brown/Burnette	'77	7-1	1-15-1	2-10
Price (W)	'77	3-2	0-7	2-10
Shipman (W)	'77	1-8	3-11	2-8-1
Stanley (B)	'77	3-3	3-12-1	7-5
Green/Anderson	'77	2-3	4-3	0-12
Simmons	'77	8-1	0-17	2-9-1
Humphries	'77	4-6	2-16	6-6
Holton	'78	3-6	5-13	6-5-1
Gray	'78	3-0	1-2	2-10
Farley/Farley	'78	7-2-1	2-18	6-6
Maddox	'78	2-4-1	0-12	3-9
Wimes	'78	2-2	1-7	3-9
Gordon	'78	5-0	0-6	3-9
Green	'78	6-2	0-19	3-8-1
Carey	'78	0-0	5-10-1	0-12
Redding (B)	'79	2-3	2-5	1-11
Hurt/Hurt	'80	4-4	0-21	0-12
Skinner	'80	3-5	1-17	2-10
McClendon	'81	6-2	7-11	4-8
Total	39	137-103-2	92-333-9	

WILKERSON COUNTY

Defendant, Race, Year		Prosection B-W-U	Defense B-W-U	Jury B-W-U
Brown		1-9	5-1	1-10-1
Lane	'74	7-2	1-10-1	6-6
Reynolds	'74	2-5	6-12	3-8-1
Hurst	'74	3-6-1	7-12-1	4-7
Fountain	'75	1-4	3-4	5-7
Daniel	'74	5-5	7-5-1	1-11
Barron	'75	3-5-1	6-9	1-10-1
Veal	'75	6-3	0-20	3-8-1
Watkins	'76	5-5	6-11	3-9
Stevenson/ Lavender	'76	4-1	6-12	5-7
Stanley	'77	5-5	6-11	4-8
Harrell	'79	4-5-1	4-9	5-5-2
Evans	'80	10-0	6-15	7-5
Williams	'81	6-0-2	0-19	4-8
Total	13	60-56	63-150-3	

PETITIONERS EXHIBIT #2

ATTACHMENT B

JURY STRIKES IN ALL CAPITAL CASES TRIED BY JOSEPH BRILEY

BALDWIN COUNTY

Defendant	Def. Race	Victim Race	Year	Prosecution	Defense	Jury	Alts
				B-W-U	B-W-U	B-W-U-O	B-W-U
Hightower, John	B	3B	88	6-1-0	2-12-2	3-9-0	
[tried in Morgan County on change of venue]							
Hill, Tony	B	B	79	9-1-0	1-18-1	2-10-0	
Hill, 2d			82	8-1-0	5-15-0	4-8-0	
Legare, Andrew	W	B	77	2-6-0	6-12-1	8-4-0	
Legare, 2d			82	5-5-0	9-9-1	10-2-0	
Legare, 3d			84	2-8-0	10-10-0	5-7-0	2-0-0
Lewis, Frank	B	W	76	6-2-0	4-13-2	4-8-0	
Mason, Guy	B	B	75	6-1-1	2-15-1	4-8-0	
Mason, 2d			83	9-1-0	2-17-1	5-7-0	

BIBB COUNTY

Brown, Pless	B	W	81	9-1-0	0-20-0	5-7-0	
Horton, Jimmy	B	W	81	9-1-0	1-13-8	0-12-0	
Machetti, Rebecca A.	W	2W	83	0-7-0	0-16-4	0-12-0	0-2-0
[tried in Gwinnett County on change of venue]							

GREENE COUNTY

Parrott, K.	B	W	74	information unavailable		1-11-0	1-1-0
Peek, David	B	3B	76	3-1-0	4-10-0	1-11-0	0-2-0
Wallace, RL	B	B	79				
special plea of insanity trial				6-0	1-5	4-8-0	
trial				11-1-0	4-18-1	4-8-0	0-2-0
[both trials in Baldwin County on change of venue]							
Wallace, 2d			87	10-0-0	1-17-1	11-1-0	2-0-0
Young, Charlie*	B	W	76	10-0-0	0-20-0	1-11-0	
Young, Derwin	B	W	76	10-0-0	0-20-0	6-6-0	

* Mr. Briley missed voir dire due to flu. George Lawrence Sr. exercised jury strikes. Mr. Briley, however, did supervise the jury strikes.

JASPER COUNTY

Defendant	Def. Race	Victim Race	Year	Prosecution	Defense	Jury	Alts
				B-W-U	B-W-U	B-W-U-O	B-W-U
Walker, Vernon R.	B	W	77	7-0-0	0-13-1	4-8-0	0-1-1

JONES COUNTY

Finney, Eddie	B	W	77	7-0-0	0-16-2	2-10-0	
Finney, 2d			83	8-0-0	2-12-0	5-6-0-1	
[tried in Morgan County on a change of venue]							
Gibson, Sam	B	W	75	8-2-0	1-16-3	2-10-0	
Westbrook, Johnny M.	B	2W	77	information unavailable			
Westbrook, 2d			85	10-0-0	0-19-0	7-5-0	
[tried in Morgan County on a change of venue]							

PUTNAM COUNTY

Amadeo, Tony	W	W	77	information unavailable		7-5-0	
Baker, Lilton	B	B	79	5-6-0	13-11-0	1-11-0	1-1-0
Evans, Jonny F.	B	W	85	12-0-0	0-19-5	3-9-0	0-0-2

WILKINSON COUNTY

Harrell, George R.	W	W	79	6-4-0	4-8-1	6-6-0	

Jimmy Lee HORTON, Petitioner-Appellant,

v.

Walter ZANT, Warden, Georgia Diagnostic and Classification Center, Respondent-Appellee.

No. 90-8522.

United States Court of Appeals,
Eleventh Circuit.

Sept. 3, 1991.

Rehearing and Rehearing En Banc
Denied Oct. 31, 1991.

Andrew L. Lipps, Swidler, Berlin, Chtd., Washington, D.C., Stephen B. Bright, Atlanta, Ga., for petitioner-appellant.

Paula K. Smith, Asst. Atty. Gen., Atlanta, Ga., for respondent-appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before JOHNSON, BIRCH and DUBINA, Circuit Judges.

JOHNSON, Circuit Judge:

The petitioner, Jimmy Lee Horton, under a sentence of death, appeals the district court's denial of his habeas petition. We reverse the district court's disposition of the case on three of the claims. In doing so, we note that each of the claims constitutes an independent basis for granting the writ.

I. STATEMENT OF THE CASE

A. *Background Facts*

On the evening of November 28, 1980, Jimmy Lee Horton and Pless Brown borrowed Hamp Davis' pickup truck in order to commit several burglaries. Early in the evening, Horton and Brown broke into a house and stole a black barrelled .22 caliber pistol and a television set. The pistol was unloaded. Horton and Brown brought the television set to Hamp Davis' house where Mrs. Davis helped them sell the set to one of her co-workers. The two men then left and went to Raintree Apartments where Horton and Brown broke into Ms. Sherrell Grant's apartment. They then proceeded to steal a silver-colored pistol and some furniture. In the course of loading the furniture onto the truck, they were discovered by Ms. Grant's boyfriend, Don Thompson.[1] Thompson was shot and killed. A ballistics expert determined that Thompson was shot with a copper coated CCI bullet fired from the black barrelled pistol.

Earlier that evening Thompson and Ms. Grant went to a friend's house for dinner and drinks. Thompson escorted Ms. Grant home, but before they entered her apartment, Ms. Grant noticed the door pried open. Thompson knocked on a neighbor's door and borrowed a pistol. Thompson then entered the apartment, looked around, and went out the back door towards the parking lot. Meanwhile, Ms. Grant stood in front of her door talking to her neighbor. Just then a short black man with

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[1] Don Thompson was the District Attorney for Bibb County, Georgia.

an "Afro" haircut[2] came around the corner of the apartment complex from the direction of the parking lot. He saw Ms. Grant; he turned around and fled. Behind this man was a taller black man with shorter hair.[3] Ms. Grant told this man that he "wasn't going anywhere." This man, according to Ms. Grant, raised a black barrelled pistol and shot at her but missed.[4] Ms. Grant quickly ducked into the neighbor's apartment. While she was hiding in the apartment, she heard what she thought was two separate guns firing.[5]

At the same time that Ms. Grant thought she heard guns firing, Ms. Carol Baker was looking out her window and saw a gun firing from the passenger side of a truck in the parking lot. Ms. Baker was unable to identify either of the two men in the truck since the truck quickly drove away. Another resident, Mr. Robert Theil, waited until after the gunfire, then ventured outside and found Mr. Thompson's body.

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[2] This description roughly described Pless Brown.

[3] Apparently Jimmy Lee Horton.

[4] The bullets were retrieved from a wall. The ballistics expert concluded that they were Remington bullets but that they were too badly damaged to perform any further identification. The expert testified that either the silver barrelled gun, the black barrelled gun, or any other .22 caliber gun could have fired the bullets.

[5] Other witnesses could neither confirm nor deny whether two separate guns were fired. Because Thompson evidently forgot to take his borrowed gun off the safety, it is clear that Thompson did not fire his gun. The prosecutor argued that during the trials that both Horton and Brown fired at Thompson.

In the ensuing days, the local police matched the description of the truck to Hamp Davis' truck. The police questioned Davis and he implicated Horton and Brown. The police then arrested Horton and Brown. Following the arrest, Horton's common law wife gave the police the black barrelled gun that was stolen in the burglary and used in the shooting of Thompson. A search of Horton's house pursuant to a warrant turned up Remington bullets similar to those fired at Ms. Grant, but no copper-coated CCI bullets. Horton confessed to taking part in the robbery, but claimed that Brown shot Thompson.

B. *Procedural History*

1. Trial

Horton and Brown were each charged with two counts of burglary and with one count of murder. They were tried separately.[6] At trial, Horton admitted to participating in the two burglaries and to shooting at Ms. Grant[7] but he claimed that Brown shot Thompson and later switched guns with him. The prosecution's case against Horton was largely circumstantial.[8] The prosecutor, Mr. Joseph Briley, emphasized to the jury that Ms.

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[6] Brown was found guilty on all counts and given a life sentence.

[7] He was not charged with shooting at Ms. Grant.

[8] The evidence as to which of the two burglars shot Mr. Thompson was so weak that Mr. Briley, the prosecutor in both Horton's and Brown's trials, told the jury in his closing during Brown's trial that, "I am not going to tell you that I know who shot the gun that put the fatal bullet into Mr. Thompson. I'm not going to tell you I know because I don't."

Grant saw Horton shooting at her with the black barrelled gun,[9] that the gun was found in Horton's apartment, and that Horton's story was somewhat incredible.[10] The only direct evidence against Horton came from Hamp Davis. Davis testified that Horton told him he shot Thompson because Thompson drew a gun on Horton and it was "either him or me." Davis also testified that Brown had told him that Horton shot Thompson.[11]

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[9] Ms. Grant, however, mistakenly pointed at the wrong exhibit when she was asked to identify the gun Horton was carrying. Ms. Grant mistakenly claimed that Horton was carrying Exhibit 6, the .32 caliber semiautomatic Berretta pistol found in Mr. Thompson's hands. The defense attempted to capitalize on this mistake, arguing to the jury that the black barrelled gun and the silver barrelled gun are a lot more similar in appearance to each other than either gun is to the gun found in Mr. Thompson's hands. Also, the defense argued that Mr. Horton was a considerable distance from Ms. Grant, that it was dark out, and that Mr. Horton was running away when he turned and shot at Ms. Grant.

[10] Horton told the jury that he initially had the silver gun and that he later traded guns with Brown. Horton, however, changed his story several times on the witness stand. It is difficult to determine, from Mr. Horton's testimony, exactly when he had the silver gun and when he had the black gun. The only thing that is clear from the testimony is that Horton is certain that he did not have the black gun when Thompson was shot.

[11] The defense, however, impeached Davis' credibility. The district attorney's office, at the time of trial, was debating whether to prosecute Davis' wife for selling the stolen television and participating in other similar sales. Davis himself and some of his brothers were initially suspects in the shooting. And, Davis was picked up for questioning after work one day and was held for fourteen hours until early the next morning.

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The jury convicted Horton of murder. The penalty phase of the trial was extremely short. The state introduced certified copies of Horton's prior convictions for armed robbery, burglary, theft, and escape. The defense called no witnesses and offered no evidence in mitigation. The jury recommended a sentence of death.

Following the trial, Horton sought a new sentencing hearing on the basis of an affidavit by Arthur Fryer who stated that he heard Brown confess to being the one who shot Thompson. During an evidentiary hearing Fryer stated that he told no one about Brown's confession until after the trial, but then, on cross-examination, he admitted that he told Horton before the trial of Brown's alleged confession. Horton, nevertheless, claimed the evidence warranted a new sentencing hearing because the evidence was newly available since, at the time of Horton's trial, Fryer was a fugitive from justice. The trial court denied Horton's motion to grant a new sentencing hearing.

2. Appeals and Collateral Appeals

Horton's conviction and sentence of death was affirmed on appeal by the Georgia Supreme Court. *Horton v. State*, 249 Ga. 871, 295 S.E.2d 281 (1982), *cert. denied*, 459

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During this questioning, the police did not provide him dinner until after midnight. Early in the questioning, Davis denied any knowledge of the shooting and denied lending his truck to anyone that night. After a night of questioning, he inculpated Horton and Brown and he told the police that Horton had confessed to him about being the triggerman.

U.S. 1188, 103 S.Ct. 837, 74 L.Ed.2d 1030 (1983). Horton then filed a petition for habeas corpus in state court in December of 1983. The trial court held an evidentiary hearing and then denied the writ. The Georgia Supreme Court summarily affirmed the trial court. The United States Supreme Court denied certiorari. *Horton v. Georgia*, 484 U.S. 905, 108 S.Ct. 248, 98 L.Ed.2d 206 (1987).

Horton then brought this federal habeas petition. Horton alleged 14 claims. The district court held an evidentiary hearing which focused on the *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), claim. On April 12, 1990, the district court rejected all 14 claims on the merits and then denied the petition. This appeal followed.

II. ANALYSIS

A. *The Swain v. Alabama Claim*

Horton claims that the prosecutor violated the Equal Protection Clause of the 14th Amendment by using the state's peremptory challenges in a racially discriminatory manner. Such a claim is governed by *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).[12] *Swain*

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[12] While a portion of *Swain* was prospectively overruled in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Court in *Allen v. Hardy*, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986), held that *Swain* still governed those cases which became final prior to the Court's decision in *Batson*. Horton's conviction became final when the United States Supreme Court denied his request for a writ of certiorari in 1983. Therefore, Horton's claim is covered by *Swain*, not *Batson*.

recognized that peremptory challenges were historically exercised in a secretive manner, and that they historically could be exercised for any reason, or for no reason at all. *Swain*, therefore, cloaked prosecutors with the presumption that they utilized their peremptory challenges in order "to obtain a fair and impartial jury." *Id.* at 222, 85 S.Ct. at 837. However, the Court held that this presumption can be rebutted by the defendant should he or she establish a prima facie case showing that the peremptory challenges were exercised in a racially discriminatory manner.

The Court held that in order to establish a prima facie case, the defendant must come forward with "[s]uch proof [that] might support a reasonable inference that [blacks] are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny [blacks] the same right and opportunity to participate in the administration of justice enjoyed by the white population." *Id.* at 224, 85 S.Ct. at 838. The Court held that "the defendant must . . . show the prosecutor's *systematic* use of peremptory challenges against [blacks] over a period of time." *Id.* at 227, 85 S.Ct. at 839 (emphasis added). The court suggested in dicta that the prima facie case may be established by proof that "the state has not seen fit to leave a single [black] on any jury in a criminal case." *Id.* at 224, 85 S.Ct. at 838.[13]

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[13] *Swain* also stated that, while the Court was generally opposed to allowing defendants to examine a prosecutor's use of peremptory challenges, at some point the Court had to allow such an examination, because

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Our case law has, on several occasions, returned to the problem detailed in *Swain*. The threshold question that each of our cases has focused upon is what level of proof is sufficient to create the "reasonable inference" that a given prosecutor is using peremptory strikes in order to deny blacks the right to participate on juries. In *Willis v. Zant*, 720 F.2d 1212 (11th Cir.1983) (*Willis* I), this Court held that the defendant "is not required to show that the prosecutor *always* struck *every* black venireman offered to him . . . but the facts must manifestly show an intent on the part of the prosecutor to disenfranchise blacks from traverse juries in criminal trials in his circuit." *Id.* at 1220 (emphasis in original). Our case law has

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> when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of [blacks] who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no [blacks] ever serve on petit juries, the Fourteenth Amendment claim takes on added significance.

Id. at 223, 85 S.Ct. at 837. The Court did not state that such a showing is the minimum showing that a defendant must prove in order to demonstrate a prima facie equal protection claim. As the case law of our Circuit demonstrates, lesser showings are also adequate to demonstrate a prima facie case. *See* discussion *infra*. As a result, while our case law has repeatedly cited this language, we have not used this language as a litmus test. Rather, our case law has treated this language as if it were a heuristic example, *i.e.*, an example so extreme as not to be realistic but nonetheless useful to make a point, similar to that used by practitioners of the socratic method.

noted that the defendant "bears a heavy burden" in making the showing. *Easter v. Estelle*, 609 F.2d 756 (5th Cir.1980). Because of this heavy burden, evidence that a prosecutor struck every black juror in one trial, *Easter*, 609 F.2d at 759, or in six trials held in the course of one week, *United States v. Pearson*, 448 F.2d 1207 (5th Cir.1971), has been held to be insufficient to demonstrate a prima facie case under *Swain*. Our Court has held that a defendant can make such a showing either by coming forward with statistical evidence or by using testimony from individuals who have witnessed the prosecutor's manner of exercising his peremptory strikes. *Willis* I, 720 F.2d at 1220 n. 18.

In *Jones v. Davis*, 835 F.2d 835 (11th Cir.1988), we held that the defendant met his prima facie burden by placing into the record testimony from six defense attorneys from the criminal defense bar who stated that they thought the prosecutor's office regularly struck all or most of the blacks on the jury. *See also Love v. Jones*, 923 F.2d 816 (11th Cir.1991) (the testimony of two defense attorneys with twenty-three combined years of experience is sufficient to make out a prima facie case). The Court in *Jones v. Davis* noted that while statistical evidence would have been stronger, the impressions of these members of the criminal defense bar are adequate to support a finding that the defendant had demonstrated a prima facie case.

The defendant's goal in demonstrating that the prosecutor struck all or most of the blacks from criminal juries is to enable the court to infer the prosecutor's intent. *Willis* I, 720 F.2d at 1220. The defendant, in the case at hand, correctly argues that in addition to inferring the

prosecutor's intent from statistics, we can infer the prosecutor's intent from the prosecutor's past allegedly discriminatory actions.

Horton has gathered considerable evidence about two incidents involving the prosecutor, Mr. Joseph Briley. The first incident involves the prosecution of Charlie Young, a black man, in 1976 in Greene County, Georgia. Evidently in Greene County, during this time period, the grand and traverse jury lists underrepresented blacks by significant margins. Mr. Briley, in his deposition in this case, admitted that he was aware, at the time of Mr. Young's prosecution, that it was unconstitutional to try an individual when cognizable groups in the general population were underrepresented on the jury lists. Nonetheless, Mr. Briley engaged in questionable tactics to foreclose a jury challenge. Mr. Young was represented by Reuben Garland, an elderly lawyer who was suffering from substantial disabilities during the trial.[14] According

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[14] This Court in *Young v. Zant*, 677 F.2d 792 (11th Cir.1982), ruled Mr. Garland's assistance ineffective. At least until after the closing of the guilt phase of Mr. Young's trial, Mr. Garland was unaware that Georgia death penalty trials were bifurcated. He adopted an

> unsupportable defense to all counts and ignored [several] obvious defenses . . . he conceded his client's guilt of all three crimes for which he was charged in the guilt phase of the trial; and he did so because of his mistaken belief that such an action was strategically necessary in order to make a strong plea for mercy. Whether, on the facts of this case, such a tactical decision would have been proper under the former Georgia criminal procedure, which

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to the record, Mr. Garland filed a motion attacking the racial disparities in the jury pool. Seven days later, Mr. Briley set the motion for a hearing,[15] scheduling the hearing to commence within three days. Mr. Briley then was able to convince the court to deny the motion because Mr. Garland was unable to gather sufficient evidence to prove the disparity in the jury lists which existed and was not corrected until a court order was issued in another case two years later. Mr. Briley's hardball tactics clearly do not comport with the prosecutor's obligation to "do justice." The tactics, however, may be understandable, though not excusable, in light of Mr. Briley's natural desire to obtain a conviction.

The second incident is even more egregious and less defensible. Mr. Briley admitted in his deposition that he was the author of a now infamous memo designed to underrepresent blacks, women and all individuals 18-24 years old on Putnam County's grand and traverse juries. The memo lists specific numbers of individuals in these three categories and directs the clerk of the court to put a set number of individuals from each of these categories on each grand and traverse jury. The numbers were designed to underrepresent each group by a significant amount, but the disparity was intelligently designed to

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> Garland still believed to be in effect, we can discern *no* possible reason for this conduct under the present bifurcated procedure.

Id. at 799 (emphasis in original).

[15] At that time in Greene County, the district attorney set the trial calendar.

avoid constituting a prima facie underrepresentation under existing Fifth Circuit and Supreme Court case law. *See Amadeo v. Zant*, 486 U.S. 214, 218, 108 S.Ct. 1771, 1773, 100 L.Ed.2d 249 (1988).[16] This memo was accidentally discovered by a plaintiff's attorney who was challenging the make-up of the traverse and grand juries in Putnam County. *See Bailey v. Vining*, Civ. Action No. 76-199 MAC

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[16] Under the case law at the time of this incident, the federal courts recognized that certain disparities between the traverse jury and grand jury pools and the general population were too excessive to be consistent with rules of probability. *See Preston v. Mandeville*, 428 F.2d 1392 (5th Cir.1970). The courts allowed proof of excessive disparities to constitute a prima facie case that the jury pools were illegally constituted. *Id.* Lesser disparities were held to be acceptable because of normal variations not due to intentional discrimination. *Swain v. Alabama*, 380 U.S. at 205-06, 85 S.Ct. at 827-28. The memo, however, intentionally underrepresented the numbers of blacks, women, and young adults by listing the following numbers:

	Percent of Traverse Jury Pool	Percent of Population
Males	60%	48.4%
Women	40%	51.6%
Black	37%	42.1%
White	63%	51.6%
18-24 age	2%	17.2%
	Percent of Grand Jury Pool	**Percent of Population**
Males	70%	48.4%
Women	30%	51.6%
Black	31.4%	42.1%
White	68.6%	51.6%
18-24 age	Illegible	Illegible

(M.D.Ga., Aug. 17, 1978). Horton attached to the record in this case a copy of a portion of the record from *Bailey*. In *Bailey*, the Putnam County clerk testified that the district attorney's office brought this memo over to the clerk's office and ordered the clerk to follow the memo when the office drew up the grand and traverse jury lists.[17] Mr. Briley, in the case at hand, argues that he should not be viewed as morally culpable because of this memo. Mr. Briley claims that the memo originated during the Mary Jackson case. In that case, Mary Jackson's defense lawyer, George Lawrence, Jr., brought a jury challenge because of the great disparity between the racial and sexual composition of the jury pool and the composition of the general population. It is undisputed that Mr. Briley joined the jury challenge. Mr. Briley claims that in the course of this jury challenge he drew up this memo and presented it to Judge Jackson, who is now deceased. Mr. Briley claims that he told the judge that these numbers were the absolute minimums allowable under the case law and that he suggested that the pool should be reconstituted to reflect the population at large. Mr. Briley stated, in his deposition, that Judge Jackson, over this objection, ordered him to reconstitute the jury pool by placing the minimum numbers of blacks and women into the jury pool, and he alleges that the judge forbade him from bringing the numbers up to population norms. Horton, however, notes that there is conflicting evidence in the record on this

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[17] This memo was also the subject of the dispute in *Amadeo v. Zant*, 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988).

question.[18] The district court never made a finding of fact as to whether Judge Jackson actually ordered Mr. Briley to tamper with the numbers, and we decline to make any factual finding on appeal.

Nevertheless, even if we were to assume Mr. Briley's version of the story was true, we cannot condone his behavior. First it is suspicious that Mr. Briley gave Judge Jackson a memo listing the minimum numbers of blacks and women that would survive a jury challenge. Second, the mere fact that a judge orders a prosecutor to engage in unconstitutional discrimination on the basis of race and sex does not make the behavior right. A prosecutor has a duty to "do justice" and at the very least he should place his objections on the record and not engage in the subsequent cover up denounced by the Supreme Court in *Amadeo*.

Although these two incidents are relevant to determining Mr. Briley's intent when he later engaged in the peremptory strikes, this evidence alone is not sufficient to constitute a prima facie case under *Swain*.

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[18] There was no record made of this hearing before Judge Jackson. Besides the late Judge Jackson, Mr. Briley, Mr. Lawrence, and Mr. Copeland, Mr. Lawrence's assistant, were present at this hearing. Both Mr. Copeland and Mr. Lawrence remember Mr. Briley joining the defense in the challenge to the jury pool and they remember Judge Jackson ordering the pool redone. Neither attorney remembers Judge Jackson telling Mr. Briley to put only the minimum numbers of blacks and women into the jury pool. Mr. Lawrence also specifically stated that he would have remembered such an order if Judge Jackson had made it.

However, Horton also supplements these incidents with a statistical analysis of Mr. Briley's peremptory strikes. Mr. Briley has been district attorney since 1974 for the Ocmulgee Judicial Circuit, which covers eight Georgia counties.[19] In Baldwin County, where 37.3% of the residents are black, the record shows that from 1974 to 1981, Mr. Briley used his peremptory strikes to strike 462 blacks and 164 whites in non-capital cases. In capital cases, he used his peremptory strikes to strike 152 blacks and 26 whites. In Green County, where, according to the 1980 census, 52.6% of the residents are black, Mr. Briley has used his peremptory challenges to strike 74 blacks and 22 whites in non-capital cases and 47 blacks and 2 whites in capital cases.[20] In Jasper County, where 59.4% of the residents are black, Mr. Briley used his peremptory challenges to strike 58 blacks and 45 whites in non-capital cases and 7 blacks and 0 whites in capital cases. In Jones County, where 32.2% of the residents are black, Mr. Briley used his peremptory strikes to strike 137 blacks and 103 whites in non-capital cases and 33 blacks and 2 whites in capital cases. In Wilkerson County, where 44.9% of the residents are black, Mr. Briley used his peremptory challenges to strike 60 blacks and 56 whites in non-capital cases and 6 blacks and 4 whites in capital cases. Finally,

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[19] Due to limits in record keeping, data is not available for some of the cases tried in some of the smaller counties. The data that is available is attached to this opinion as Appendix A.

[20] There is some dispute in the record, but Mr. Briley may have participated in the striking of ten additional blacks (and 0 whites) in the Charlie Young case. Mr. Briley claimed to have supervised, but not participated in, the striking of the jury in that case.

in Putnam County, Mr. Briley used 17 of his peremptory challenges to strike blacks and 6 to strike whites in capital cases.[21] In short, between 1974 and 1981, Mr. Briley exercised 1,580 peremptory strikes, 1,095 of them (70%) against black venire members. These 1,580 peremptory strikes can be broken down into capital and non-capital cases. Mr. Briley exercised 234 peremptory strikes in capital cases, 184 of them (79%) against black venire members. Finally, Mr. Briley exercised 1,346 peremptory strikes in non-capital cases, 911 of these strikes (67.7%) against black venire members.

In the three counties with sufficient data to provide a meaningful sample (Baldwin, Green, and Jones counties), Horton's statistician, Dr. Liberson, compared the racial breakdown of Mr. Briley's use of peremptory strikes to the population statistics. Dr. Liberson concluded that the likelihood in each of these three counties, that Mr. Briley was using a race neutral method for exercising the strikes was less than 1 in 100,000.

Dr. Liberson also broke the data down into other helpful statistics.[22] Dr. Liberson found that in capital

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[21] Mr. Briley also tried three capital cases in Bibb County, outside of his usual judicial circuit. In those three cases, he struck 18 blacks and 9 whites.

[22] We held in *Willis* I that the determination of whether the prosecutor was violating the Equal Protection Clause turns on his or her behavior in all of the cases that he or she prosecuted. *Willis* I, 720 F.2d at 1220. However, that does not suggest that evidence of the prosecutor's behavior in certain cases is not relevant to helping define the prosecutor's intent in the rest of the cases. Specifically, the Supreme Court has noted, in a

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cases involving black defendants, Mr. Briley used 89.9% of his peremptory strikes (169 out of 189 strikes) against black venire members. In capital cases involving a black defendant and a white victim, Mr. Briley used 94.1% of his peremptory strikes (96 out of 103 strikes) against black venire members. Similarly, in non-capital cases involving a black defendant, Mr. Briley used 85% of his strikes (557 out of 659 strikes) against black venire members. Because the strike rate differed when the defendant was black and when the defendant was white, Dr. Liberson compared the rate at which Mr. Briley struck black venire members in cases where the defendant was black with the strike rate in cases where the defendant was white and concluded that the likelihood that Mr. Briley was exercising his peremptory challenges in a manner not related to the race of the defendant was less than 1 chance in 100,000.

The state disagreed with Dr. Liberson's conclusions for several reasons. First, the state attacks Dr. Liberson's

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separate context, that in our society interracial crime is treated differently than other crimes. *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). Under our case law, a disparity in the prosecutor's use of peremptory challenges in either interracial crimes or in crimes where the defendant is black is insufficient by itself to demonstrate a *Swain* violation. However, such a disparity in conjunction with a showing in all of the prosecutor's cases may be sufficient to overcome the heavy burden of *Swain*. Such a showing in these cases is by no means required by our case law, but on the other hand, if the data is available, it is at the very least relevant.

data. The state's statistician, Dr. Katz,[23] had different tallies on the number of strikes. However, the state stipulated that Horton's jury strike information was correct[24] and Dr. Katz admitted in his deposition that the combined effect of all the alleged errors was marginal.

Second, the state argues that Horton's methodology is flawed because Dr. Liberson failed to control for various variables, including the individual's attitude towards law enforcement and the death penalty. Such a criticism may in fact be valid if there was only a marginal difference between Mr. Briley's strike rate and the percentage of blacks within the general population. However, when the difference is statistically significant, the criticism lacks persuasive force. From the data we can draw only one of two conclusions: either Mr. Briley made his peremptory strikes based on the race of the venire members or Mr. Briley made his peremptory strikes based upon some set of legitimate factors and these legitimate factors by sheer coincidence had virtually a one-to-one correlation with the race of the venire members. However, the only conclusion that we are willing to draw from our case law is that courts cannot make a blind leap of faith that there exists some set of legitimate factors which correlates one-to-one with the race of the venire members. Our unwillingness to make such an assumption is

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[23] Dr. Katz, incidentally, was the state's statistician in *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir.1985) (en banc) *aff'd* 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

[24] Such a stipulation is binding on the state in this Court. *See Busby v. City of Orlando*, 931 F.2d 764, 770-771 n. 4 (11th Cir.1991).

precisely the reason that under *Batson* prosecutors are currently forced to explain the legitimate non-racial reasons for exercising their peremptory challenges once a prima facie case has been established.

Third, the state offers an alternative method for examining the data. Dr. Katz examines Mr. Briley's peremptory strikes by comparing Mr. Briley's strikes to the strikes of a hypothetical prosecutor who exercises his peremptory strikes solely on the basis of race. Dr. Katz's hypothetical prosecutor would never strike a white venire member if it would mean that the prosecutor would later have to forego striking a black venire member. Therefore, Dr. Katz constructed a model where the prosecutor used his strikes to strike only blacks with a singular goal of creating an all-white jury. Dr. Katz noted that Mr. Briley could have used 1,765 peremptory strikes, but used only 1,411 strikes. Dr. Katz also notes that 966 (or 68.5%) of Mr. Briley's strikes were against black venire members and that a total of 752 black jurors sat in the various trials. Dr. Katz found that his hypothetical prosecutor, if confronted with the same choices as those presented to Mr. Briley, would have struck an additional 676 black venire members, leaving only 76 black jurors in the 183 trials. Dr. Katz concluded that Mr. Briley did not use his peremptory strikes solely to prevent black venire members from serving on juries.

The state's alternative methodology and statistics are helpful, but not dispositive. As is clear from *Willis* I, the goal of the statistical evaluation is to allow this Court to infer the prosecutor's intent. An examination of the number of black venire members that could have been struck, if that was the prosecutor's only goal, is a fair

indicator of the prosecutor's intent.[25] We, however, do not find the state's numbers dispositive because we recognize that in the real world a prosecutor may have a number of concerns which may affect his or her decision to utilize a peremptory strike.[26] The problem implicit in *Swain* is that in the course of any strike or series of strikes

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[25] We note that our Court in *Willis v. Kemp*, 838 F.2d 1510 (11th Cir.1988) (*Willis* II), utilized a similar methodology and determined that the petitioner failed to establish a prima facie case under *Swain*. The state argues that *Willis* II stands for the proposition that the state's methodology is the only relevant methodology to be used in evaluating a *Swain* claim. The state is simply incorrect. The *Willis* II Court considered the state's methodology in conjunction with evidence of the prosecutor's strike rate. Moreover, *Willis* II never stated a preference for either methodology.

[26] The record includes an extended discussion by Mr. Briley in which he explains how he uses his peremptory challenge. Mr. Briley stated that there are a number of factors and that the factors may be assigned different priorities in different cases. Moreover, Horton correctly argues that the state's methodology does not adequately summarize what occurred at the trials. Horton argues that the hypothetical prosecutor might forego striking a potential black juror if the next venire member in the pool was also black. A peremptory strike of one black venire member, which results in a venire member being replaced by another black venire member, does not result in any change in the racial composition of the ultimate jury. Horton argues that the state's methodology is invalid unless the state can prove that the use of each of the so-called "wasted" peremptory strikes against one of the black venire members would actually alter the racial balance of the actual juries. While Horton's criticism is accurate, we find that the critique goes to the weight of the evidence, not the admissibility.

the prosecutor may have legitimate, as well as illegitimate, motivations. This problem of mixed motives is precisely why we approach this analysis with a broad interpretation of relevance and we require the petitioner to carry a heavy burden.

We therefore examine both the state's statistics and Horton's statistics in order to infer the prosecutor's intent. We can conclude from the state's statistics that race was not the *only* factor that affected Mr. Briley's use of his peremptory strikes. From Horton's statistics, however, we cannot help but conclude that race was a very significant factor in Mr. Briley's decision-making process.[27] In short, we find that the statistical evidence is sufficiently strong "to overcome the presumption of propriety in which *Swain* clothes peremptory challenges." *Willis* I, 720 F.2d at 1220. We therefore can reasonably infer that Mr. Briley was exercising his peremptory challenges in order to deny blacks the "right and opportunity to participate in the administration of justice." *Swain*, 380 U.S. at 224, 85 S.Ct. at 838.

Because Horton has demonstrated a prima facie case, the burden shifts to the state to rebut this showing. Such a rebuttal can be accomplished in two ways. "First, [the prosecutor] may make 'a showing that racially neutral selection procedures have produced the [historical and systematic] disparity.' [Second,] the prosecutor [may] show neutral reasons for the striking of all the blacks in

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[27] We recognize that because of the limits of statistics, Dr. Liberson was able only to reject the null hypothesis that race was not a factor in Mr. Briley's decision process.

petitioner's trial itself." *Willis* I, 720 F.2d at 1220-21 (quoting *United States v. Perez-Hernandez*, 672 F.2d 1380, 1387 (11th Cir.1982)). The state admits that it cannot meet its burden of proof under the second method. Mr. Briley has not retained any of his notes from the voir dire, he has no independent memory of the strikes, and he can point to nothing helpful in the record explaining why he used nine of his ten strikes against black venire members. The state argues, however, that Mr. Briley employed "racially neutral selection procedures" that unfortunately had a disparate impact on black venire members.

In evaluating Mr. Briley's rebuttal it is appropriate to keep in mind that "'testimony from the alleged discriminators should be viewed with a great deal of judicial scrutiny.'" *Id.* at 1221 (quoting *Perez-Hernandez*, 672 F.2d at 1387). Moreover, protestations of innocence and blanket denials of bad faith intentions are inadequate. *Id.* With this standard in mind, we note that Mr. Briley stated that he did not exercise his peremptory strikes on the basis of race. He claimed that he frequently relied upon local sheriffs and sheriffs' deputies for advice about venire members' reputations before striking any jurors.[28]

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[28] The record only partially bears out Mr. Briley's claims. Mr. Briley named several sheriffs and deputy sheriffs (some now dead) upon whom he relied for advice. In depositions, some of the sheriffs indicated that they occasionally would give Mr. Briley advice about the venire members' reputations. However, Mr. Briley listed specific cases where he relied on the officers' recommendations and the officers deny that they advised Mr. Briley in some of those cases. Furthermore, Deputy Sheriff Columbus Johnson described at least two of the venire members, whom he allegedly had told Mr. Briley to strike from one of the juries, as "pillars of the community."

Based on the advice of these officers, he claimed to strike individuals if they had a connection to the defendant, the defendant's family, or the defendant's attorney. He also struck jurors if they had a reputation for lawlessness. Under our standard of review, the state has not made a sufficient showing. the only testimony comes from Mr. Briley. His answers are devoid of any specifics.[29] The state did not place into the record any voir dire excerpts or testimony from any of Mr. Briley's assistants explaining the strike pattern. The burden of proof is on the state, and the state has failed to carry it.

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[29] Leaving aside Mr. Briley's comment about the venire member's reputation for lawlessness, Mr. Briley's main explanation is that the black venire members may know the defendant, the defendant's family, or the defendant's lawyer because of residential neighborhood patterns. First, venires are asked whether they have any such knowledge during the initial strikes for cause. Presumably, the excerpts from the voir dires in those cases could bear out Mr. Briley's claim, but they never were placed in the record. Second, we would expect Mr. Briley's strike pattern to change in those cases in which the trial court granted a change of venue. Presumably, black individuals in the new location would not know the defendant or his family. Mr. Briley's strike pattern, however, did not bear out this assumption in the six trials where the venue was changed. The six trials were: the John Hightower trial, where 6 of 7 strikes were against blacks; the R.L. Wallace insanity proceeding, where 6 of 6 strikes were against blacks; the first R.L. Wallace trial, where 11 of 12 strikes were against blacks; the second R.L. Wallace trial, where 10 of 10 strikes were against blacks; the second Eddie Finney trial, where 8 of 8 strikes were against blacks; and the second Johnny Westbrook trial where 10 of 10 strikes were against blacks. We have no choice but to conclude that Mr. Briley's proffered reason was pretextual.

B. *Ineffective Assistance of Counsel at Sentencing*

Horton claims that he received ineffective assistance of counsel during the sentencing phase of the trial. In order for Horton to prevail on this claim, he must establish that his trial counsel's performance was deficient and that this performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

1. The Performance Prong

Strickland held that in evaluating whether a trial counsel's performance must be deficient, the counsel's performance must be evaluated for "reasonableness under prevailing professional norms." *Id.* at 688, 104 S.Ct. at 2065. Courts should presume effectiveness and should avoid second-guessing with the benefit of hindsight. *Id.* at 689, 104 S.Ct. at 2065. Specifically, *Strickland* encouraged reviewing courts to allow attorneys broad discretion to represent their clients by pursuing their own strategy. However, the Court recognized that merely invoking the word strategy to explain errors was insufficient since "particular decision[s] must be directly assessed for reasonableness [in light of] all the circumstances." *Id.* at 691, 104 S.Ct. at 2066.[30]

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[30] Our caselaw strongly insulates an attorney's strategic decisions from later review. *Middleton v. Dugger*, 849 F.2d 491 (11th Cir.1988). However, so called "strategic" decisions that are based on a mistaken understanding of the law, *see Young v. Zant*, 677 F.2d 792 (11th Cir.1982), or that are based on a misunderstanding of the facts, *see King v. Strickland*, 748 F.2d 1462 (11th Cir.1984), are entitled to less deference.

Strickland furthermore emphasized that an attorney's performance must be evaluated in light of "all the circumstances." *Id.* at 688, 104 S.Ct. at 2065. The state, however, reads this language to imply that we must evaluate an attorney's performance by examining his or her performance in its entirety and by viewing the whole trial as an indivisible unit. The state is simply mistaken. Our Circuit, on a number of occasions, has evaluated an attorney's performance during discreet portions of a trial without regard to the attorney's performance at other points during the trial. *See, e.g., Stephens v. Kemp,* 846 F.2d 642 (11th Cir.1988) (holding the attorney's performance during the penalty phase ineffective despite the fact that the attorney's performance during the guilt phase was effective). However, we have remained faithful to *Strickland's* command by evaluating all of the circumstances surrounding the attorney's performance during each discreet portion of the trial.

Horton claims that he received ineffective assistance of counsel during the sentencing phase of the trial. During the sentencing phase, his attorneys did not call any witnesses and they introduced no evidence. His attorneys waived their opening but gave a closing. In the closing, Mr. Wallace, one of Horton's attorneys argued five main points. The bulk of Wallace's time was spent reviewing the history of the death penalty in Georgia in an effort to teach the jury about the concept of the jury exercising controlled discretion and the idea that the death penalty should be used to punish society's worst crimes. Wallace argued that a shootout in the course of burglary was not the moral equivalent of torture or mass murder. Wallace further argued that Horton should not be executed

merely because the victim turned out to be the district attorney. Wallace's second and third points were mentioned only in passing. Wallace briefly mentioned that, on the state of the evidence, no one really knows what happened the night of the murder and Wallace suggested that if a burglar had killed Horton, rather than the district attorney, the state would not be seeking the death penalty. Wallace's fourth point was that if the jury rejected the death penalty, Horton would spend the rest of his life in jail and that was adequate punishment. Wallace concluded by begging for mercy.

Horton argues that his attorney was ineffective because of four separate reasons. First, and most importantly, Horton's attorneys performed little pretrial investigation into mitigation and they introduced no mitigating evidence. During the state habeas corpus evidentiary hearing, Horton's two trial attorneys admitted that they performed no pretrial investigation into mitigating circumstances and that they performed hardly any investigation during the trial. The attorneys testified during this hearing that the only investigation that they conducted during the trial consisted of a phone call to Horton's mother the night before the penalty phase of the trial was set to begin. The attorneys asked Mrs. Horton whether she would attend the penalty phase and sit among the spectators. The attorneys remember her declining the request and they thought that she said something about having the flu. The attorneys testified that they asked Mrs. Horton no other questions and conducted no other investigation.

Also during the state evidentiary hearing, Horton's trial attorneys attempted to justify their conduct as the

product of a "tactical decision." The attorneys testified that they did not put on mitigating evidence, or conduct any investigation, because they felt that mitigating evidence was appropriate only in gruesome cases involving torture. The attorneys thought that by arguing mitigating evidence the jury would somehow draw the implication that "it was a horrible [torture-filled] case when it wasn't." The state court found that the decision not to investigate mitigating evidence, not to place the evidence before the jury, and not to argue the evidence was a reasonable tactical decision.

This court's review of an ineffective assistance of counsel claim is *de novo* because it is a mixed question of law and fact. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Subsidiary factual questions found by state courts are entitled to a presumption of correctness under 28 U.S.C.A. § 2254(d) (West 1977). The question of whether a decision was a tactical one is a question of fact. *See Bundy v. Wainwright*, 808 F.2d 1410, 1419 (11th Cir.1987). Because there is support in the record for the state court's finding that this decision was tactical, we must presume the state court's finding of fact was correct. However, whether this tactic was reasonable is a question of law, and we owe neither the district court nor the state court any deference on this point. *See id.*

This tactical decision was unreasonable. First, Horton's trial attorneys completely misunderstood the purpose, under Georgia law, of presenting mitigating evidence. Mitigating evidence, when available, is appropriate in every case where the defendant is placed in jeopardy of receiving the death penalty. To fail to do any

investigation because of the mistaken notion that mitigating evidence is inappropriate is indisputably below reasonable professional norms.[31] Second, our case law rejects the notion that a "strategic" decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them. *See King v. Strickland*, 748 F.2d 1462, 1464 (11th Cir.1984). In the case at hand, the attorneys began to follow one path, based upon a misinterpretation of the law, without ever evaluating the merits of alternative paths. We, therefore, cannot conclude, as the state urges us, that Horton's attorneys failed to introduce mitigating evidence because they believed that the evidence was too weak; his attorneys never investigated or evaluated the evidence.

Horton next argues that his trial attorneys' performance was unreasonable because passages from Mr. Wallace's closing argument virtually encouraged the jury to impose the death penalty. Mr. Wallace told the jury that "the one you judge is not a very good person . . . I ask you for the life of a worthless man." And, the prosecutor's closing "made me hate my client. But then, I . . . try to be reasonable about the whole situation; and I don't hate him as much . . . Mr. Briley has admirably told you

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[31] Moreover, Horton's trial attorneys' explanation that they thought that a discussion of mitigating circumstances would somehow imply that the case was torture-filled when it was not is unacceptable. A jury who has already heard the evidence during the guilt phase, including the coroner's report, obviously would know if the case involved torture. It is unreasonable to assume that a jury would somehow infer from the fact that the defense presented mitigating evidence that the defendant engaged in torture.

just exactly why it is that Jimmy Lee has got to die. And it becomes my turn to try and explain to you why you don't have to say he's got to die . . . I find my task virtually impossible . . . Maybe Mr. Briley is right, maybe he is not. Maybe he ought to die, but I don't know."

Third, Horton claims his attorneys took pains to separate themselves from him during the closing. Mr. Wallace explained that he and his co-counsel were appointed counsel; that they were local lawyers and not "bleeding heart, anti-death penalty lawyers"; that the reason they were representing Horton was because it was their "civic duty"; and they stated that they "have to deal with [prosecutors] every day. It's important for me to stay in good with them. [I feel] there is a lot of peer pressure on me [but] nobody has tried to pressure me."

Finally, Horton complains that his attorneys should have devoted a larger portion of their closing argument to the possibility that Brown was the triggerman. In the jury charge during the guilt phase, the jury was instructed that it could have found Horton guilty either as the triggerman or as an aider and abettor. Horton complains that his attorneys should have argued a residual doubt theory. Horton's trial attorneys did mention residual doubt in their closing argument, though only in passing. Although one might prefer a thorough discussion of the facts of this case and a different attorney probably would have taken a different approach, we are unwilling to term this approach an unreasonable one. Because of the shortness of this particular penalty phase, the closing arguments quickly followed the jury's deliberation in the guilt phase. The jury was aware of the facts

and only a passing reference to them would have been reasonable under the circumstances.

In conclusion, we find that Horton's trial attorneys' performance during the sentencing phase of the trial was unreasonable in light of prevailing professional norms. We find their performance unreasonable because they failed to investigate and present mitigating evidence. Mr. Wallace attacked his client's character and separated himself from his client. Even when we evaluate the performance in light of what they did well, we conclude that the performance was unreasonable.

2. The Prejudice Prong

In order for Horton to prevail on this claim, he must establish prejudice from his counsel's unreasonable assistance. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. A petitioner satisfies the prejudice prong of *Strickland* when he or she can show that the trial counsel's deficient performance deprived the defendant of "a trial whose result [was] reliable." *Id.* "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068.

Horton has met his burden of proof on the prejudice prong. Horton had mitigating evidence that could have been presented. Horton has gathered the affidavits of ten individuals who claim they would have testified if they ever were asked to testify. Horton evidently was a hard worker, was a good youth, and was able to provide for his common law wife and their daughter, and he successfully adjusted to previous stays in prison. Our Circuit

has in the past held that a failure to present similar mitigating evidence at sentencing for a similar crime was sufficient to establish prejudice. *See Harris v. Dugger*, 874 F.2d 756 (11th Cir.1989) (The defendant was sentenced to death for a murder which occurred during a thwarted robbery; we granted the writ because his counsel failed to proffer evidence that the defendant had a good family life.).

Moreover, Horton's counsel's argument to the jury raises the distinct possibility that portions of the closing argument encouraged rather than discouraged the jury to impose the death penalty. Wallace's attacks on Horton's character and his attempts to distance himself from his client could only have hurt Horton's cause. Given Wallace's failure to present mitigating evidence and his unfortunate comments, clearly there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. We therefore find that Horton received ineffective assistance of counsel at the sentencing phase of the trial.

C. *Confrontation Clause*

Horton also raises a Confrontation Clause claim. Horton argues that his right "to be confronted with the witnesses against him" was violated when Hamp Davis was permitted to testify that Pless Brown told him that Horton was the triggerman. Davis testified that, several days after the shooting, Brown approached him in a bar and told him "Jimmy [Horton] did the shooting; [I] didn't do the shooting."

Under Georgia law, this statement by Brown was admissible under the co-conspirator exception to the hearsay rule. *See Horton v. Kemp*, Civil Action No. 6252, slip op. at 45 (Butts County Ct., Nov. 7, 1986); *see also Chatterton v. State*, 221 Ga. 424, 144 S.E.2d 726 (1965). Under Georgia Law, a statement by a co-conspirator is admissible as long as the co-conspirator's statement was made while "[t]he culprits [are] still concealing their identity." *Chatterton*, 144 S.E.2d at 732. The state habeas trial court found that the statement met the requirements of Georgia's co-conspirator hearsay exception. Horton does not argue that the Georgia courts have misapplied Georgia Law. He argues that this application violates the Confrontation Clause.

In *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the Supreme Court laid down general rules to mediate the apparent conflict between admissible hearsay and the requirements of the Confrontation Clause. *Roberts* held that the Confrontation Clause mandates that the government must demonstrate both that the defendant is unavailable and that the hearsay is marked with a sufficient " 'indicia of reliability' " to be deemed sufficiently trustworthy to be used in a prosecution. *Id.* at 66, 100 S.Ct. at 2539 (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 213, 92 S.Ct. 2308, 2313, 33 L.Ed.2d 293 (1972). In *United States v. Inadi*, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986), the Supreme Court modified *Roberts* by holding that the Confrontation Clause does not require the government to prove that the declarant is unavailable when the hearsay is admissible under the co-conspirator exception to the hearsay rule.

The Supreme Court in *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), returned to the trustworthiness requirement of *Roberts*. The Court in *Bourjaily* held that there is no need to make an independent inquiry into the reliability of a statement "when the evidence 'falls within a firmly rooted hearsay exception.' " *Id.* at 183, 107 S.Ct. at 2782 (quoting *Roberts*, 448 U.S. at 66, 100 S.Ct. at 2539). The *Bourjaily* Court held that statements which fall within the traditional common law co-conspirator exception to the hearsay rule are presumed to be sufficiently reliable to satisfy the trustworthiness prong of the Confrontation Clause. *Id.* The Court, however, carefully pointed out that the presumption does not apply to those trials conducted in states that have not adopted the common law formulation of the exception. Specifically it noted, in dicta, that the formulation used in Georgia, which is the one at issue in the case at bar, is sufficiently different to mandate a case by case evaluation of the hearsay for indicia of reliability. *Id.* The court referred to *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), where the Court evaluated the Georgia co-conspirator exception which admits hearsay from a co-conspirator when the statement was made after the termination of the conspiracy. Therefore, following the dicta in *Bourjaily*, Pless Brown's hearsay statement, made days after the robbery, must have sufficient indicia of reliability in order to comply with the requirements of the Confrontation Clause.

The state argues that any analysis into reliability is foreclosed by the plurality opinion in *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213, (1970). The state mistakenly claims that *Dutton* stands for the proposition

that Georgia's co-conspirator hearsay rule always complies with the requirements of the Confrontation Clause. The plurality,[32] however, stated that "[t]he Georgia statute *can* obviously have many applications consistent with the Confrontation Clause, and we conclude that its application *in the circumstances of this case* did not violate the Constitution." *Id.* at 88, 91 S.Ct. at 219 (emphasis added). Similarly, the Court in *Bourjaily* read *Dutton's* plurality opinion to stand for the proposition that Georgia's unique hearsay exception must be evaluated for reliability on a case by case basis.

The *Dutton* Court held that the hearsay at issue did not violate the Confrontation Clause. The facts at issue in *Dutton*, however, differ significantly from the facts in this case. In *Dutton*, petitioner's co-conspirator, following his arrest, told another inmate that "if it hadn't been for that dirty son-of-a-bitch Alex Evans, we couldn't be in this [problem] now." The prosecution used this testimony, along with the testimony of nineteen other witnesses (including another co-conspirator), to prove that Evans over-reacted to a police stop by grabbing an officer's gun and then participating in the execution-style slaying of

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[32] Plurality opinions are only persuasive authority; they are not binding on this Court. *See Foster v. Bd. of School Comm'rs of Mobile County*, 872 F.2d 1563, 1569 n.8 (11th Cir.1989); *Powers v. Alabama Dep't of Educ.*, 854 F.2d 1285, 1292 n. 11 (11th Cir.1988). However, the holding of the court precludes lower courts from reaching results at odds with a narrow reading of the question before the court. *Cf. Mandel v. Bradley*, 432 U.S. 173, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977) (per curiam) (instructing lower courts how to interpret summary affirmances and dismissals for want of a substantial federal question).

three officers. The Court held that the hearsay did not violate the Confrontation Clause for four reasons. Two of the four reasons help distinguish *Dutton* from this case. The Court in *Dutton* explained that the hearsay "contained no express assertion about past fact" because the jury had to infer past facts from the statement. *Id.* at 88, 91 S.Ct. at 219. Also, the Court focused on several indicia of reliability: the declarant had no apparent reason to lie to the other prisoner, the statement was spontaneous, and the statement was against the declarant's penal interest. *Id.* at 89, 91 S.Ct. at 220. The hearsay, in this case, is very different. Pless Brown told Hamp Davis that Horton killed the victim. This statement is "an express assertion about [a] past fact" and leaves nothing for the jury to infer. Moreover, the statement was mostly, if not wholly, exculpatory. Although one can infer from the statement that Brown participated in the burglary, the explicit content of the statement is wholly exculpatory for the murder charge.

We find that the hearsay statements of Brown, as related by Davis, violated Horton's right to confront his accuser. Because the Georgia co-conspirator hearsay exception is much broader than the traditional common law exception, this hearsay must be judged for reliability under the standards elaborated in *Dutton v. Evans*. Under these standards, the hearsay lacks sufficient indicia of reliability: the statement was not res gestae, it was not given under oath, it was not against penal interest, etc. Moreover, this statement was exculpatory. Also, it was made days after the crime while the press was intently following the massive police investigation that was then underway. Finally, it was made to a friend while the

declarant and the witness were drinking together in a bar. Simply put, this is not the sort of evidence that can properly form the basis of a conviction.

In this case, we do not find this Confrontation Clause violation to be harmless. The case demonstrating that Horton was the triggerman was largely circumstantial and was fairly weak. The only direct evidence that Horton was the triggerman was Horton's and Brown's alleged statements to Davis. We are unable to conclude that the error of admitting unreliable hearsay in violation of the Confrontation Clause can be termed harmless.

D. *Booth Error*

Horton also complains that the trial court failed to instruct the jury that the "fact that the victim was the District Attorney . . . is not to be considered by you as . . . evidence in aggravation." Horton claims that the instruction is necessary because, during the trial, witnesses periodically referred to Thompson as the district attorney. The prosecutor referred to Thompson in his closing argument during the guilt phase as a "fellow district attorney" and a "hardwarking district attorney." The prosecutor during his sentencing phase closing argument stated that "[a]lthough I knew and admired Don Thompson as a fellow prosecutor, I'm . . . asking for the death penalty because Don Thompson was killed; not because the district attorney was killed."

Complaints about the failure to give proper instructions during sentencing can raise two types of errors: state law error and constitutional violations. The Georgia

Supreme Court has determined that this failure to charge did not violate state law. *See Horton v. State*, 249 Ga. 871, 295 S.E.2d 281 (1982). We are not free to second guess the Supreme Court of Georgia on his state law question. Horton claims that these repeated references to the victim's occupation somehow made the sentence of death arbitrary and capricious. We disagree. To the extent that he is alleging that the jury gave the victim's occupation undue weight, this problem was mitigated by an extensive voir dire in which Horton elicited a promise from each juror not to consider the victim's occupation and by Horton's closing argument in which he reminded the jurors of their promises. To the extent that Horton is arguing that this is a victim impact statement under *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), such a constitutional violation is no longer cognizable after *Payne v. Tennessee*, ___ U.S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

E. *The Failure to Order a New Sentencing Hearing*

Horton finally argues that the trial court's failure to grant a new trial to consider newly discovered evidence violates the due process clause. Eight months after his trial, Horton moved the trial court for a new sentencing hearing to consider some newly discovered evidence. Horton alleged that he recently discovered that Pless Brown, a few days after the shooting, confessed to Arthur Fryer that he, and not Horton, had actually shot Thompson. The trial court, following a hearing on this motion, denied Horton's motion for a new trial. The trial court reasoned that under Georgia procedural law, as set

out in *Emmett v. State*, 232 Ga. 110, 205 S.E.2d 231 (1974), the new trial motion must be denied because there was evidence that Fryer told Horton about Brown's confession prior to the trial.[33]

Horton is attempting to challenge the application of the state's procedural rule as a violation of some general due process right to offer this exculpatory testimony. This case is controlled by the Supreme Court's decision in *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). The Court in *Taylor* recognized that a complaint about a state procedural rule which limits a defendant's "right to offer testimony [is properly] grounded in the Sixth Amendment even though it is not expressly described in so many words." *Id.* 409, 108 S.Ct. at 652. The Court, though, noted that the defendant's right to present testimony must be weighed against the state's need to enforce procedural rules and to conduct criminal trials in an orderly manner. *Id.* at 411, 108 S.Ct. at 653. The Court conducted such a balancing in *Taylor* and concluded that a trial court *could* exclude exculpatory evidence as a sanction for violating a valid discovery rule. Moreover, there was dicta in the opinion suggesting that the same result would occur in a case involving evidence discovered after the trial. *Id.* at 414, 108 S.Ct. at 655. Although the language is dicta in *Taylor*, we make it our holding. We hold that a state court may in appropriate circumstances, apply its state procedural rules and

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[33] Horton never told his attorney about Fryer's revelation. Fryer testified at this hearing that he could not be available for the trial because he was hiding from the police. By the time of this hearing, Fryer was in jail.

exclude exculpatory evidence presented to the trial court after the completion of trial without necessarily running afoul of the Compulsory Process Clause of the Sixth Amendment as it is applied through the due process clause of the Fourteenth Amendment.

The Court in *Taylor* recognized that while a state court may, in general, exclude evidence under its procedural rules, the constitutionality of each case must be judged on its own facts. *Taylor* examined the rationale for the procedural rule at issue and then compared the facts of the case to the rationale. *Taylor* indicated that the rationale for excluding newly discovered evidence included the state's desire for finality, a strong presumption that jury verdicts are correct, and a suspicion that newly discovered evidence may be fabricated. *Id.* at 414 n. 18, 108 S.Ct. at 655 n. 18. In this case, the exclusion of the evidence did not violate the Sixth Amendment because there is a strong reason to suspect that Fryer may have fabricated the evidence in order to get Horton off death row. First, a few days after the shooting, Fryer told his friends a different story. At that time, Fryer said that Horton had told him that he, and not Brown, had shot Thompson. Second before he agreed to testify, Fryer asked whether his testimony could be used against Brown. Fryer suggested that he was unwilling to testify about his alleged conversation with Brown if it would result in Brown's receiving extra punishment. Third, Fryer did not stick to one consistent story during his testimony; in several instances he altered minor corroborating details. We therefore find no constitutional violation in the Georgia state court's decision refusing to grant Horton a new trial.

III. CONCLUSION

We AFFIRM the district court's decision not to grant the writ of habeas corpus on the basis of the denial of the new sentencing hearing and the failure to give the requested instructions.[34] However, we REVERSE the district court's denial of the writ on the basis of the *Swain* claim, the ineffective assistance of counsel at sentencing claim, and the confrontation clause claim. We REMAND this case to the district court with instructions to grant the writ condition on the state's right to retry the petitioner within a reasonable time.

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[34] The petitioner also raised in the district court nine other claims which were not appealed to this Court. Any claim that was raised below, but not discussed in this opinion, is waived.

APPENDIX A

JURY STRIKES IN ALL CAPITAL CASES TRIED BY JOSEPH BRILEY

BALDWIN COUNTY

Defendant	Def. Race	Victim Race	Year	Prosecution B-W-U	Defense B-W-U	Jury B-W-U	Alts. B-W-U
Hightower, John [tried in Morgan County on change of venue]	B	3 B	88	6-1-0	2-12-2	3-9-0	
Hill, Tony	B	B	79	9-1-0	1-18-1	2-10-0	
Hill, 2d			82	8-1-0	5-15-0	4-8-0	
Legare, Andrew	W	B	77	2-6-0	6-12-1	8-4-0	
Legare, 2d			82	5-5-0	9-9-1	10-2-0	
Legare, 3d			84	2-8-0	10-10-0	5-7-0	2-0-0
Lewis, Frank	B	W	76	6-2-0	4-13-2	4-8-0	
Mason, Guy	B	B	75	6-1-1	2-15-1	4-8-0	
Mason, 2d			83	9-1-0	2-17-1	5-7-0	

BIBB COUNTY

Defendant	Def. Race	Victim Race	Year	Prosecution B-W-U	Defense B-W-U	Jury B-W-U	Alts. B-W-U
Brown, Pless	B	W	81	9-1-0	0-20-0	5-7-0	
Horton, Jimmy	B	W	81	9-1-0	1-13-8	0-12-0	
Machetti, Rebecca A. [tried in Gwinnett County on change of venue]	W	2 W	83	0-7-0	0-16-4	0-12-0	0-2-0

APPENDIX A – Continued
GREENE COUNTY

Defendant	Def. Race	Victim Race	Year	Prosecution B-W-U	Defense B-W-U	Jury B-W-U	Alts. B-W-U
Parrott, K.	B	W	74	Info. not available	' ' '	1-11-0	1-1-0
Peek, David	B	3 B	76	3-1-0	4-10-0	1-11-0	0-2-0
Wallace, R.L. Special plea of insanity trial	B	B	79	6-0	1-5	4-8-0	
Wallace, R.L.-Trial [both trials in Baldwin County on change of venue]				11-1-0	4-18-1	4-8-0	0-2-0
Wallace, 2d			87	10-0-0	1-17-1	11-1-0	2-0-0
Young, Charlie*	B	W	76	10-0-0	0-20-0	1-11-0	
Young, Darwin	B	W	76	10-0-0	0-20-0	6-6-0	

* Mr. Briley missed voir dire due to flu. George Lawrence, Sr. exercised jury strikes. Mr. Briley, however, did supervise the jury strikes.

JASPER COUNTY

Defendant	Def. Race	Victim Race	Year	Prosecution B-W-U	Defense B-W-U	Jury B-W-U	Alts. B-W-U
Walker, Vernon R.	B	W	77	7-0-0	0-13-1	4-8-0	0-1-1

JONES COUNTY

Defendant	Def. Race	Victim Race	Year	Prosecution B-W-U	Defense B-W-U	Jury B-W-U	Alts. B-W-U
Finney, Eddie	B	W	77	7-0-0	0-16-2	2-10-0	
Finney, 2d			83	8-0-0	2-12-0	5-6-1	
[tried in Morgan County on change of venue]							
Gibson, Sam	B	W	75	8-2-0	1-16-3	2-10-0	
Westbrook, Johnny M.	B	2 W	77	not	available		
Westbrook, 2d [tried in Morgan County on change of venue]			85	10-0-0	0-19-0	7-5-0	

PUTNAM COUNTY

Defendant	Def. Race	Victim Race	Year	Prosecution B-W-U	Defense B-W-U	Jury B-W-U	Alts. B-W-U
Amadeo, Tony	W	W	77	not	available	7-5-0	
Baker, Lilton	B	B	79	5-6-0	13-11-0	1-11-0	1-1-0
Evans, Jonny F.	B	W	85	12-0-0	0-19-5	3-9-0	0-0-2

WILKINSON COUNTY

Defendant	Def. Race	Victim Race	Year	Prosecution B-W-U	Defense B-W-U	Jury B-W-U	Alts. B-W-U
Harrell, George R.	W	W	79	6-4-0	4-8-1	6-6-0	

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8522

JIMMY LEE HORTON,

versus

WALTER ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent-Appellee.

On Appeal from the United States District Court
for the Middle District of Georgia

(Filed Oct. 31, 1991)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion September 3, 1991, 11th Cir., 1991, ___F.2d___).

Before: JOHNSON, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

(✔) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson, Jr.
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/90)